Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

NATIONAL LOAN INVESTORS, L.P.,

Petitioner,

v.

MICHAEL E. and TOMMYE DENOFA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under 11 U.S.C. § 506(b), the holder of an allowed secured claim is entitled to post-petition interest where the value of all property securing the claim exceeds the amount of the allowed secured claim, but the value of property in which the debtor's estate has an interest does not exceed the amount of the allowed secured claim.

2. Did the Third Circuit correctly hold that a lender, which who receives a payment from a non-debtor co-guarantor, must apply that payment to the principal obligation of a co-guarantor who has filed for bankruptcy protection; or may the lender apply the payment to interest which accrued on the non-debtor co-guarantor's obligation after the debtor's bankruptcy filing?

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Petitioner National Loan Investors, L.P. (the "Petitioner" or "NLI"), the Appellant below, respectfully prays that a writ of certiorari issue to review a decision and order of the United States Court of Appeals for the Third Circuit entered February 17, 2005 in this matter. In that decision, the Third Circuit affirmed a decision and order of the United States District Court for the District of New Jersey dated January 27, 2004. The District Court's decision reversed an order which granted partial summary judgment to NLI, entered by the United States Bankruptcy Court on October 16, 2002.

NLI filed a timely petition for panel rehearing with the Third Circuit pursuant to Federal Rule of Appellate Procedure 40, which was denied on March 16, 2005.

OPINIONS BELOW

The March 16, 2005 Order which denied NLI's petition for panel rehearing is unreported and is reproduced hereto as Appendix "H." The February 17, 2005 decision of the United States Court of Appeals for the Third Circuit, which affirmed a decision and order of the United States District Court for the District of New Jersey, is unreported and is reproduced hereto as Appendix "A." That decision is available on Westlaw at 2005 WL 375703. The February 17, 2005 order of the United States Court of Appeals for the Third Circuit is unreported and is reproduced hereto as Appendix "B."

The March 3, 2004 Order of the United States District Court, denying NLI's motion for reconsideration of its January 27, 2004 decision and order, is unreported and is reproduced hereto as Appendix "C." The January 27, 2004 decision of the United States District Court, reversing a

decision and order of the United States Bankruptcy Court for the District of New Jersey, is unreported and is reproduced hereto as Appendix "D." The January 27, 2004 order of the United States District Court is unreported and is reproduced hereto as Appendix "E."

The October 16, 2002 decision of the United States Bankruptcy Court for the District of New Jersey, granting the Petitioner partial summary judgment, is unreported, and is reproduced hereto as Exhibit "F." The October 16, 2002 decision of the United States Bankruptcy Court for the District of New Jersey is unreported, and is reproduced hereto as Exhibit "G."

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the February 17, 2005 decision of the Third Circuit is invoked under 28 U.S.C. § 1254. This Petition for Certiorari is timely filed as it is filed within ninety days after the Third Circuit's March 16, 2005 Order denying NLI's petition for panel rehearing pursuant to Federal Rule of Appellate Procedure 40.

STATUTORY PROVISIONS INVOLVED

Section 506(b) of Title 11 of the United States Code (the "Bankruptcy Code") provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

STATEMENT OF THE CASE

A. Factual Background

NLI's Petition involves a question of statutory interpretation under Title 11 of the United States Code (the "Bankruptcy Code") which arises frequently in Bankruptcy Courts, and which has been subject to varying holdings. This case provides an ideal vehicle for this Court to resolve this issue decisively, and to provide for uniformity of application currently lacking under the statutory provision at issue, 11 U.S.C. § 506(b).

National Loan Investors, L.P. ("NLI") filed a proof of claim against the Chapter 11 Bankruptcy Estate of Michael E. and Tommye DeNofa (the "DeNofas"), which included a principal amount of $323,615.69 and post-petition interest thereon. The basis for NLI's claim was money loaned to DAK Manufacturing Corporation ("DAK") by NLI's predecessor-in-interest. Steven Katz ("Mr. Katz") and Michael DeNofa guaranteed the loan. To secure the loan, DAK granted the lender a mortgage and security interest in property owned by DAK. To further secure the debt, Mr. Katz and his wife, and Mr. DeNofa and his wife, each conveyed a mortgage on their homes which served as part of the lender's collateral.

NLI sought post-judgment interest on its proof of claim against the DeNofas' under the terms of 11 U.S.C. § 506(b), which allows for an award of post-judgment interest where an "allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim." The DeNofas objected to the NLI proof of claim for a number of reasons. Of relevance here, the DeNofas conceded that the value of all property securing the NLI's allowed secured

claim exceeded the amount of that allowed secured claim. Nonetheless, the DeNofas objected to an award of interest to NLI because the value of the property in which the Debtors' Estate had an interest was less that NLI's allowed secured claim. The DeNofas argued that, under 11 U.S.C. § 506(b), a bankruptcy court may only look to property in which a debtor's estate has an interest to determine whether the holder of an allowed secured claim is entitled to post-petition interest.

The Bankruptcy Court rejected the DeNofas' argument, holding that the precise language of Section 506(b) required, for purposes of determining whether a holder of an allowed secured claim was entitled to post-petition interest, the aggregation of all property securing the claim. Therefore, the Bankruptcy Court held that since the value of all property securing the NLI allowed secured claim exceeded the value of such claim, NLI was entitled to post-petition interest in accordance with the precise provisions of that statute. The Bankruptcy Court cited to the decision in *In re Arnett*, 156 B.R. 366, 367 (Bankr. D. Conn. 1993) to support its decision.

The DeNofas appealed the Bankruptcy Court's decision to the United States District Court for the District of New Jersey, which treated the Notice of Appeal as a request for interlocutory review. The District Court reversed the Bankruptcy Court, holding that, for purposes of determining whether a creditor is entitled to post-petition interest under 11 U.S.C. § 506(b), a court may only consider the value of property in which a debtor's estate has an interest. For its part, the District Court disregarded the Bankruptcy Court's reliance on *Arnett*, and cited to the decision in *In re Stephen Shields Pardue*, 143 B.R. 434 (Bankr. D. Tex. 1992) in

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support of its holding. NLI appealed this ruling to the United States Court of Appeals for the Third Circuit, arguing that Section 506(b) speaks of all "property" not just "property in which the estate has an interest." The Third Circuit affirmed the District Court's ruling.

NLI now seeks this Court's review of a substantial question which split the courts below in their rulings. The holdings of the District Court and the Third Circuit are inconsistent with the precise language of Section 506(b). The District Court and the Third Circuit wrongfully denied to NLI the post-petition interest which had been awarded by the Bankruptcy Court. The Bankruptcy Court correctly determined that it was not disputed that the value of all property securing NLI's allowed secured claim exceeded the value of the claim, and that NLI was entitled to post-petition interest under 11 U.S.C. § 506(b). The District Court and the Third Circuit, however, refused to look to the value of all property securing NLI's allowed secured claim. Even though no such limitation is found within Section 506(b), these courts only considered the property in which the Debtors' Estate had an interest in ruling that NLI was not entitled to post-petition interest.

B. Statement of Federal Jurisdiction

The DeNofas' Adversary Proceeding, objecting to NLI's proof of claim, was filed before the Bankruptcy Court which, pursuant to 28 U.S.C. § 157(b)(2)(B), possessed "core" jurisdiction over the DeNofas' complaint pertaining to the allowance or disallowance of a claim against the DeNofas' bankruptcy estate. The United States District Court for the District of New Jersey possessed appellate jurisdiction

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of the bankruptcy proceedings pursuant to 28 U.S.C. § 158(a)(2). The United States Court of Appeals for the Third Circuit possessed appellate jurisdiction of the District Court proceedings pursuant to 28 U.S.C. § 158(d).

REASONS FOR THE GRANTING THE PETITION

I. Under Section 506(b), The Issue Of Whether An Allowed Secured Claim Is Entitled To Post-Petition Interest Is Resolved By Looking To All Property Securing The Claim In Order To Determine Whether The Claim Is Oversecured.

The first issue before the Court concerns the proper application of 11 U.S.C. § 506(b). NLI holds an allowed secured claim against the DeNofas' estate. NLI's claim was secured against property of the Debtors' estate, specifically their residence. The NLI claim was also secured by other property in which the Debtors' did not have a direct ownership interest. The DeNofas do not dispute that the value of all collateral securing NLI's claim against the DeNofas exceeded the amount of NLI's claim. Since NLI's principal claim is secured by property, the value of which is greater than the amount of its claim, NLI argued to the Bankruptcy Court that, under 11 U.S.C. § 506(b), NLI was entitled to post-petition interest on its claim, as well as any reasonable fees, costs or charges, as provided for in the DeNofa Guaranty. This is the result required by the precise, unambiguous language of 11 U.S.C. § 506(b). The Bankruptcy Court sustained NLI's argument.

The District Court reversed the Bankruptcy Court on this issue, and the Third Circuit affirmed that ruling. These courts held that section 506(b) authorizes an award of post-petition interest only where the creditor's claim is secured against

property in which the Debtors' estate has an interest, the value of which is greater that the amount of the creditor's claim. These courts thus concluded that the Bankruptcy Court erred when it considered collateral other than the property in which the Debtors' estate has an interest for purposes of determining whether NLI was entitled to post-petition interest. In addition to the DeNofas' residence, NLI's claim was secured against property owned by DAK Manufacturing, the principal obligor ("DAK") and Stephen Katz, a co-guarantor ("Mr. Katz"). But the District Court and the Third Circuit declined to consider that property in making its analysis under section 506(b).

The Bankruptcy Court was correct. Section 506(b) does not limit the valuation inquiry to property in which the estate has an interest. The statute is unambiguous:

> To the extent that an allowed secured claim is secured by property, the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

As properly held by the Bankruptcy Court, Congress used the term "property" in section 506(b) without limiting that term. The Third Circuit's construction of section 506(b) imposes a limitation on the term "property" that Congress did not. As a result, the Third Circuit, for valuation purposes under section 506(b), did not consider the "property" securing the NLI loan, but only the "property in which the estate had an interest," in violation of the statute.

If Congress had intended to limit the court's inquiry under section 506(b) to only that property in which the estate had an interest, it would have said so. Instead of drafting the statute that it did, the statute would read as follows:

> To the extent that an allowed secured claim is secured by property **[in which the debtor has an interest]**, the value of which .. . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest upon the claim, and any reasonable fees, costs or charges provided for under the agreement under which the claim arose.

(the bold and bracketed language *not* part of the actual statute). The Bankruptcy Court applied a statute that did not include the bold and bracketed language found in the above quotation. The Bankruptcy Court applied the statute as drafted, and was improperly reversed by the two appellate courts.

The cardinal rule of statutory interpretation is that where a statute is plain and unambiguous on its face, a court must apply the statute as drafted. *Dow Chemical Company v. United States Environmental Protection Agency*, 635 F.2d 559, 561 (6th Cir.), *cert. denied*, 452 U.S. 939, 101 S. Ct. 3082, 69 L. Ed. 2d 953 (1981) (*citing Southeastern Community College v. Davis*, 442 U.S. 397, 405, 99 S. Ct. 2361, 2366, 60 L. Ed. 2d 980 (1979) and *United States v. Oregon*, 366 U.S. 643, 648, 81 S. Ct. 1271, 1280, 6 L. Ed. 575 (1961) ("It is, however, a cardinal rule of statutory interpretation that the courts do not turn to legislative history

to shed light on the meaning of easily understandable and unambiguous statutory enactments."). This Court has held:

> In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. *See, e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242, 109 S.Ct. 1026, 1030-1031, 103 L.Ed.2d 290 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103, 18 S.Ct. 3, 4, 42 L.Ed. 394 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68, 3 L.Ed. 150 (1810). When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981); *see also Ron Pair Enterprises, supra,* 489 U.S., at 241, 109 S.Ct., at 1030.

Connecticut National Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391 (1992).

Under this rule of statutory construction fixed by the Supreme Court, the Third Circuit's first duty was to consider the language of Section 506(b) and, if found to be unambiguous, to apply the statute as written without further analysis. Despite the clarity of Section 506(b), the Third Circuit nonetheless engaged in a forbidden interpretative analysis. By looking to the language of Section 506(a), and by thereafter treating the two distinct subsections as if they

were one, the Third Circuit reached an interpretation of Section 506(b) inconsistent with its precise terms.

Simply stated, under Section 506(b), the question of whether interest is allowed to a holder of an "allowed secured claim" is resolved by whether such claim "is secured by property the value of which ... is greater than the amount of such claim." Congress specifically stated that the measuring rod was the value of "property" – not just "property of the estate" – which serves as security for the allowed secured claim. The Third Circuit engrafted a limitation in Section 506(b) that Congress did not.

The Third Circuit found justification for this conclusion due to the presence of the term "allowed secured claim" in Section 506(b). This Court reasoned, correctly, that this term was defined by Section 506(a), which provides that an "allowed secured claim" is one secured by "property in which the estate has an interest ... to the extent of the value of such creditor's interest in the estate's interest in such property." From this, the Court reasoned, incorrectly, "the 'allowed secured claim' of NLI that we must examine for purposes of post-petition interest under § 506(b) is limited to the extent of the value of the DeNofas' bankruptcy estate which secures it." (6a). The Third Circuit imported a limitation found in Section 506(a) into Section 506(b), due the presence in both sections of the term "allowed secured claim."

The Third Circuit's error was its failure to appreciate that Section 506(a) and Section 506(b) have different purposes. Section 506(a) determines whether a creditor is a holder of an allowed secured claim. Section 506(b) determines whether a holder of an allowed secured claim is

entitled to post-petition interest. In order for a creditor to reach the analysis under Section 506(b), it must first pass the test under Section 506(a), meaning that he must be a holder of an allowed secured claim. That is the only significance of the use of the term "allowed secured claim" in both sections.

This is best understood by consideration of the actual facts of this case. On the filing date of the DeNofas' bankruptcy, the DeNofas' were indebted in the amount of $323,615.59 to NLI's predecessor, as determined by the Bankruptcy Court. Their home was worth $275,000 at that time.

Initially, the issue under Section 506(a) was whether NLI or its predecessor was the holder of an allowed secured claim. For purposes of that analysis, the answer is that NLI was the holder of an allowed secured claim in the amount of $275,000, since the "property in which the estate has an interest . . . to the extent of the value of such creditor's interest in the estate's interest in such property" was the value of the DeNofas' residence, or $275,000. The balance of the creditor's claim was not secured, and thus became an unsecured claim against the DeNofas' estate. *See In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 201 n.6 (3d Cir. 1995) (a creditor holds an allowed secured claim to the extent there is equity in collateral that is property of the estate, and holds an unsecured claim for the balance). Thus, at the end of the inquiry under Section 506(a), NLI's predecessor was the holder of an "allowed secured claim" in the amount of $275,000, and the holder of an unsecured claim for the balance of its claim.

Since NLI's predecessor was the holder of an allowed secured claim, the next step was the determination of whether it was entitled to post-petition interest, which is the analysis under Section 506(b). Under that section, the holder of an allowed secured claim is entitled to post-petition interest "[t]o the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim." For purposes of this analysis, a holder of an allowed secured claim is entitled to post-petition interest on that claim where it is secured by property – not just property in which the estate has an interest – which is greater in value than the amount of the allowed secured claim. Here, NLI's allowed secured claim was $275,000, and the value of all property securing that claim exceeded $1,026,817. NLI was thus entitled to post-petition interest on its allowed secured claim according to the precise terms of Section 506(b).

The Third Circuit reasoned that, because the issue of whether NLI was the holder of an allowed secured claim under Section 506(a) was determined by reference to property in which the estate had an interest, the issue of whether it was entitled to post-petition interest on its allowed secured claim also had to be resolved by reference to property in which the estate had an interest. But, as demonstrated above, the second premise does not follow logically or necessarily from the first. Congress specifically used the terminology "property in which the estate has an interest" in Section 506(a). It did not in Section 506(b). This Court must presume that Congress intended the distinction in language between the two sections, and the distinction must serve some purpose.

The Bankruptcy Court's construction of section 506(b) is not only consistent with the express terms employed by Congress, but it does not cause any absurd results. The

appellate courts, in the course of their discussions, never addressed whether the statute was plain and unambiguous on its face, even though resort to that canon of construction should have been the beginning and end of their inquiries. Perhaps the best reason for reviewing, and reversing the opinion below, was offered by the Third Circuit itself:

> Section 506(a) refers to "property in which the estate has an interest," while § 506(b) refers only to "property" generally, unmodified by any surrounding terms. As such, one is tempted to follow the interpretive principle that "'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, — U.S. ——, 125 S.Ct. 542, 548, 160 L.Ed.2d 440 (2004) (*quoting Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)). This principle "applies 'particularly when the two [provisions] are interrelated and closely positioned, both in fact being parts of the same statutory scheme.'" *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 223 (3d Cir.2004) (citation omitted). Applying the principle here would seem to support NLI's contention — because Congress included "particular language" ("in which the estate has an interest") modifying "property" in § 506(a), but omitted that "particular language" modifying "property" in § 506(b), Congress intended the disparate exclusion, i.e., Congress intended to

> limit "property" to that belonging to the estate for purposes of § 506(a), but not to that belonging to the estate for purposes of § 506(b).

(5a).

Nonetheless, the Third Circuit veered from this principle because of its subjective estimation that "[s]ubsections (a) and (b) work closely together, and one cannot correctly understand and apply the latter before understanding and applying the former" (5a). While this observation may be true, it does not support the Third Circuit's interpretation at all. What should have impressed the Third Circuit is that Congress included language in one section of Section 506 that it did not include in the other; that the sections are inter-related and closely positioned; and that both sections are part of the same statutory scheme. *See Ki Se Lee v. Ashcroft*, 368 F.3d 218, 223 (3d Cir. 2004). In the end, it is not logical to conclude, as the Third Circuit did, that due to the use of the term "allowed secured claim" in subsections (a) and (b) of Section 542, property securing "an allowed secured claim" can be secured only by property in which the estate has an interest. An "allowed secured claim" can be and is often secured against non-debtor property. Lenders often seek collateral from more than one source, and rightfully consider all collateral to be security for its loan. In enacting section 506(b), Congress intended to protect the lender's expectation in this regard, as it the lender's expectation of being fully secured which induces its decision to lend in the first place. NLI's petition implicates vital public policy concerns which can be protected by this Court's issuance of a writ of certiorari, and its reversal of the Third Circuit's decision.

For instance, suppose that a bank makes a $1,000,000 loan to a corporate borrower which loan is guaranteed by the principal of the borrower. Further suppose that as security for the $1,000,000 loan, the borrower provides a mortgage on corporate property worth $950,000 and the guarantor provides a mortgage on his/her personal property valued at $950,000. In commercial terms, the $1,000,000 loan would be secured by collateral totaling $1,900,000, an abundantly over-secured loan. Further suppose that both the borrower and guarantor then file separate chapter 11 bankruptcy cases. Under the Third Circuit's interpretation of 11 U.S.C. § 506(b), upon the filing of the bankruptcy cases, this loan would be transformed from an over-secured loan to an under-secured loan as to each debtor. The bank would be prohibited from recovering post-petition interest and fees on the loan from either the borrower or the guarantor because of the judicial myth that the loan is under-secured. A literal reading of 11 U.S.C. § 506(b), as employed by the Bankruptcy Court and advanced by NLI, precludes the absurd results of this example.

II. NLI Rightfully Applied The Payment Made By The Co-Guarantor, Made In Order To Stay Execution On A Judgment Of Foreclosure Against The Co-Guarantor, To The Interest Obligation Of The Co-Guarantor; As A Result, The DeNofas Are Not Entitled To A Credit Toward Their Principal Obligation.

The Third Circuit resolved a critical issue in this case by way of a footnote at the conclusion of its opinion, as if there were nothing to decide. The court wrote:

> We will also affirm the District Court's application of the Katzes' settlement payment of $250,000 to the principal obligation of the loan debt. A creditor

> may only apply payments on a debt to post-petition interest and costs to the extent the debt is oversecured, and must otherwise apply payments to reduce the principal of the debt. *See In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 201 (3rd Cir. 1995). Unless interest accrues on a debt during bankruptcy, there are no "theories that would support the allocation of post-petition payments to something other than the reduction of the principal debt. *Id.* at 211. The District Court correctly concluded that NLI's claim as to the DeNofas was not oversecured and did not accrue post-petition interest, and therefore correctly applied the Katzes' payment to reduce the principal of the loan debt.

(6a n.2). The panel's decision in this regard ignores critical facts and, as a result, conflicts with settled principles of law. On this issue, the Third Circuit's decision is indefensibly and transparently wrong.

As the Third Circuit recognized, post-petition payments may be applied to interest where "interest accrues on a debt during bankruptcy." (6a). This circumstance is directly relevant to this case. Regardless of whether interest accrued on Mr. DeNofa's Guaranty post-petition, interest accrued post-petition on Mr. Katz's Guaranty. Mr. Katz was a non-debtor not entitled to the protections of the Bankruptcy Code. As of the date of NLI's standstill agreement with Mr. Katz, Mr. Katz owed NLI $1,025,597.77. Mr. Katz made a $250,000 payment toward that obligation, which NLI then applied toward interest, due from Mr. Katz. What NLI did was undoubtedly within its right under universally accepted law, as well as the loan documents.

In order to understand why this is so, this Court must return to the original loan transaction with DAK Manufacturing Corporation. ("DAK"). NLI's predecessor-in-interest entered into a loan agreement with DAK for a sum not to exceed $1,000,000. DAK's obligation was secured by a mortgage and security interest in property owned by DAK as well as mortgages on real property owned by the guarantors.

Both Mr. Katz and "Mr. DeNofa", DAK's owners, signed personal Guaranties, which were secured by mortgages in favor of the lender against their personal residences. When co-guarantors each personally guarantee the obligation of third person, each co-guarantor is independently liable for the full amount of the stated obligation. *See, e.g., Finagin v. Arkansas Development Finance Authority*, 355 Ark. 440, 451, 139 S.W.3d 797, 801 (2003); *Harris Trust and Savings Bank v. Olsen*, 745 F. Supp. 503, 508 (N.D. Ill. 1990). This means that both Mr. Katz and Mr. DeNofa were, at the outset, both independently liable for the full amount of the DAK obligation.

On the date the DeNofas filed for bankruptcy, Mr. DeNofa and Mr. Katz were still both independently liable for the DAK principal obligation, and their obligations were for equal amounts. According the Third Circuit, however, upon the filing of the DeNofas' bankruptcy petition, interest ceased to accrue on Mr. DeNofa's Guaranty obligation. The Third Circuit reasoned that NLI's claim against Mr. DeNofa on his Guaranty was under-secured as of the filing date of the DeNofas' bankruptcy; therefore, the accrual of interest on Mr. DeNofa's Guaranty obligation ceased upon the filing of the DeNofas' bankruptcy petition.

Of critical importance to this analysis, however, is that interest at all times continued to accrue on the obligations of the non-debtors, including Mr. Katz, even though interest may have ceased accruing on Mr. DeNofa's Guaranty obligation. This is so because the filing of a bankruptcy petition only acts to stay the accrual of interest of the *debtor* (if the loan is under-secured). Obligations of non-debtors, however, are not affected by a bankruptcy filing, and interest continues to accrue on their obligations, notwithstanding that a co-obligor has filed for bankruptcy.

At the time NLI entered into its standstill agreement with Mr. Katz, the Mr. Katz's obligation on his Guaranty exceeded $1,000,000 in principal and interest. Again, this is because the Bankruptcy Code did not stay the accrual of interest against Mr. Katz, a non-debtor. Mr. Katz *stipulated* as a term of his agreement with NLI that his obligation to NLI on his Guaranty exceeded $1,000,000. Mr. Katz consented to the entry of a final judgment of foreclosure in the amount of $1,025,597.77 and stipulated to a payment obligation to NLI for that amount. In exchange for a payment of $250,000, NLI agreed to stay execution on the foreclosure judgment. NLI then applied Mr. Katz's payment toward interest due that had accrued on the DAK loan obligations and consequently, on Mr. Katz's Guaranty.

The Third Circuit determined that Mr. Katz's settlement payment had to be applied against Mr. DeNofa's principal obligation. It reasoned that "unless interest accrues on a debt during bankruptcy, there are no 'theories that would support the allocation of post-petition payments to something other than a reduction of the principal debt.'" (6a n.2 (*quoting In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 201 (3d Cir. 1995)).

The error in the Court's analysis is that interest did continue to accrue post-petition on DAK's obligations and on Mr. Katz's Guaranty, even if interest did not accrue on Mr. DeNofa's Guaranty obligation. On the date of NLI's standstill agreement with Mr. Katz, DAK and Mr. Katz owed NLI the sum of $1,025,597.77, even though Mr. DeNofa's obligation remained fixed as of the date of the DeNofas' bankruptcy filing.

NLI applied the $250,000 payment toward interest due from Mr. Katz. In this regard, NLI's position was explicitly authorized by the terms of the Guaranty itself. Even the District Court recognized that the Loan Documents authorized NLI to apply Mr. Katz's payment as it did:

> Based on the Loan and Security Agreement and the Guaranties, the Court finds that Judge Steckroth's factual determination that the loan documents do not require NLI to apply the Katzes' payment to NLI's claim is not clearly erroneous; therefore, that finding must be upheld.

(43a). The District Court also highlighted that "[t]he DeNofas do not contest that the loan documents would allow a creditor to apply proceeds from disposition of collateral to interest, fees and other expenses." (44a).

In the Loan Documents, the creditor reserved the right to apply funds "from whatever source on account of the Liabilities" .. . "toward the payment of such Liabilities, and in such order of application, as the Bank may from time to time elect. . . ." (000078).[1] "Liabilities" was defined in the

1. This reference is to the Third Circuit record.

Guaranty to mean "all obligations of the Debtor to the Bank," meaning not just the principal advanced, but "*all* obligations of the Debtor to the Bank, howsoever created, arising or evidenced, whether direct or indirect, absolute or contingent, or now or hereafter existing, or due or to become due . . ." (*Id.*). Accordingly, NLI possessed the right under the loan documents to apply Mr. Katz's payment to any obligation from any of the obligors to NLI, including, at its election, to overdue interest. The Guaranty is drafted in terms of what the creditor "may" do and what it may "elect" to do, is permissive in nature, and was clearly drafted to afford the creditor as much discretion as possible in its application of funds received from "whatever source."

Consistent with the documents, NLI applied Mr. Katz payment to overdue interest on Mr. Katz's Guaranty. It is vital to recall, again, that interest continued to accrue post-petition on the obligations of DAK and Mr. Katz, even if interest ceased accruing on Mr. DeNofa's Guaranty. The fundamental error that the District Court made in reversing the Bankruptcy Court on this issue, and which the Third Circuit repeated, was that it applied Mr. Katz's payment to Mr. DeNofa's principal obligation under the mistaken belief that no interest accrued post-petition. That is just not correct. Interest accrued on Mr. Katz's obligation post-petition, and NLI rightfully applied the *Katz* payment to the *Katz* obligation.

The Third Circuit cited its prior decision in *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 201 (3d Cir. 1995) for the holding reached in footnote two of the Opinion. But a careful evaluation of that decision serves to demonstrate why this Court's holding was incorrect. In *Indian Palms*, a bankruptcy court concluded that post-petition payments made by a *debtor*

during a bankruptcy proceeding were interest payments. *Id.* at 201. This determination was reversed on appeal due to the fact that no interest accrued post-petition on the *debtor's* obligation. In that case, however, there was no non-debtor obligor against whom interest continued to accrue after the filing of the debtor's bankruptcy petition. As this Court recognized, *Indian Palms* stands for the proposition that post-petition payments must be applied to the *debtor's* principal obligation "[u]nless interest accrues on a debt during bankruptcy. . . ." (Opinion, p. 6 n.2).

Here, interest did accrue post-petition on an obligation – DAK's obligation and Mr. Katz's Guaranty. NLI thus properly applied Mr. Katz's payment toward his on-going interest obligations in a manner consistent with NLI's rights under the Loan Documents. The Third Circuit senselessly undermined NLI's lawful rights in the loan documents and destroyed the value of the Katz settlement by its ruling on this issue, which NLI respectfully suggests is manifestly incorrect, and totally inconsistent with universally accepted law. The Third Circuit effectively released the DeNofas from their mortgage, without NLI receiving any offsetting payment on the mortgage, and thus transformed a fully secured corporate loan into a separate, non-interest bearing guaranty debt. This outcome was not the intention of the parties when the debt originated, and it was not the intention of Mr. Katz or NLI at the time of their standstill agreement. NLI therefore requests this Court to grant its Petition for Certiorari on this issue.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, and that upon its consideration, that it reverse the opinion of the Third Circuit, restore the decision of the Bankruptcy Court, and remand to the United States Bankruptcy Court for further proceedings.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 17, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-1686

IN RE:
MICHAEL E. DENOFA
TOMMYE DENOFA,

Debtors,

MICHAEL E. DENOFA;
TOMMYE DENOFA,

v.

NATIONAL LOAN INVESTORS, L.P.,

Appellant.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 02-cv-05524)
District Judge: Honorable John W. Bissell

Submitted Under Third Circuit LAR 34.1(a)
January 28, 2005

Before SCIRICA, *Chief Judge*, RENDELL and FISHER, *Circuit Judges.*

(Filed: February 17, 2005)

Appendix A

OPINION OF THE COURT

FISHER, *Circuit Judge.*

Appellant National Loan Investors, L.P. ("NLI") appeals from the District Court's ruling that it was not entitled to post-bankruptcy petition interest on a loan extended to the Appellee-Debtors, Michael E. and Tommye DeNofa. Post-petition interest is available under § 506(b) of the Bankruptcy Code where a debt is oversecured, i.e., where the value of the property securing the debt exceeds the amount of the debt itself. The District Court found that only property securing the loan which belonged to the bankruptcy estate—and not third-party property securing the loan—could be included in a calculation of the value of secured property for purposes of assessing a claim for post-petition interest under § 506(b). We agree with the District Court's conclusion and will therefore affirm.

As we write solely for the parties, and the facts are known to them, we will discuss only those facts pertinent to this appeal. NLI became the holder of a loan debt incurred in part by the DeNofas. The loan had originally been made to DAK Manufacturing Corporation ("DAK"), an entity wholly owned by Michael DeNofa and Steven Katz, and was secured not only by an interest in property owned by DAK, but also by guaranties executed by DeNofa and Katz, which were respectively secured by a mortgage on their private residences.

The DeNofas filed a Chapter 11 bankruptcy petition. NLI's predecessor filed a proof of claim in the DeNofa

bankruptcy proceeding, as well as a motion seeking relief from the automatic stay so as to continue with its foreclosure action against the DeNofas, or, in the alternative, dismissal of the DeNofa reorganization proceeding. The DeNofas filed an adversary proceeding against NLI seeking an accounting as to NLI's claim and a reduction in the amount the DeNofas owed on that claim due to an alleged oral agreement which purportedly froze the accrual of interest on the loan debt. NLI disputed the oral agreement claim and argued that it was entitled to post-petition interest on its claim under 11 U.S.C. § 506(b). After several proceedings before the Bankruptcy and District Courts, the District Court ultimately ruled that NLI was not entitled to post-petition interest under § 506(b). The District Court also found that a $250,000 payment made to NLI by the Katzes in order to settle a foreclosure action filed against them by NLI was to be applied to the principal amount of the loan debt. NLI filed a timely notice of appeal.

We have appellate jurisdiction pursuant to 28 U.S.C. § 158(d). We exercise plenary review over grants and denials of summary judgment, and review a district court's interpretation of a statute *de novo. See Circle Schools v. Pappert,* 381 F.3d 172, 177 (3d Cir.2004); *Mitchell v. Cellone,* 389 F.3d 86, 89 (3d Cir.2004) (citation omitted). [1] Our resolution of the primary substantive question in this appeal— whether non-debtor property may be included in determining whether a debt is oversecured—requires us to interpret § 506 of the Bankruptcy Code.[1] NLI contends that

1. Section 506 provides, in pertinent part:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is

(Cont'd)

the plain meaning of "property," standing alone and unmodified in § 506(b), encompasses more than just property belonging to the bankrupt estate. It reasons that such a reading is reinforced by the fact that § 506 more specifically defines "property" in subsection (a) as belonging to the estate, and that the omission of such specific descriptive terms surrounding "property" in § 506(b) precludes giving it the same meaning as the "property" defined in subsection (a). The DeNofas counter that one must read the entirety of § 506 and how its subsections work together, and that such a reading leads to the conclusion that § 506(b) "property" can only be property belonging to the bankruptcy estate.

(Cont'd)

> subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.
>
> (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. § 506.

Focusing only on § 506(a) and (b)'s reference to "property," and not on the entire text of the two subsections, leads one to side, at least initially, with NLI. Section 506(a) refers to "property in which the estate has an interest," while § 506(b) refers only to "property" generally, unmodified by any surrounding terms. As such, one is tempted to follow the interpretive principle that "'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 125 S.Ct. 542, 548 (2004) (quoting *Russello v. United States*, 464 U.S. 16 (1983)). This principle "applies 'particularly when the two [provisions] are interrelated and closely positioned, both in fact being parts of the same statutory scheme.'" *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 223 (3d Cir.2004) (citation omitted). Applying the principle here would seem to support NLI's contention—because Congress included "particular language" ("in which the estate has an interest") modifying "property" in § 506(a), but omitted that "particular language" modifying "property" in § 506(b), Congress intended the disparate exclusion, i.e., Congress intended to limit "property" to that belonging to the estate for purposes of § 506(a), but not to that belonging to the estate for purposes of § 506(b).

But this approach is fatally incomplete because it ignores the remainder of subsections (a) and (b). Subsections (a) and (b) work closely together, and one cannot correctly understand and apply the latter before understanding and applying the former. Section 506(b) only permits post-petition interest where an "allowed secured claim is secured by property" which exceeds the value of the "allowed secured

claim." The meaning of "allowed secured claim" dictates the outcome here. Section 506(a) defines an "allowed secured claim" as a claim secured by "property in which the estate has an interest . . . *to the extent of the value of such creditor's interest in the estate's interest in such property*[.]" 11 U.S.C. § 506(a) (emphasis added). Thus, quite plainly, the "allowed secured claim" of NLI that we must examine for purposes of post-petition interest under § 506(b) is limited to the extent of the value of the property of the DeNofas' bankruptcy estate which secures it. *See* 5 *Collier on Bankruptcy* ¶ 506.04[1] (15th rev. ed. 2003) ("For purposes of section 506(b), a secured claim is 'oversecured' to the extent that the value of the creditor's interest *in the estate's interest in property* is greater than the amount of the creditor's allowed prepetition claim.") (footnotes omitted) (emphasis added). There is no dispute that the DeNofas' property alone does not exceed the value of NLI's claim. Therefore, we will affirm the District Court's ruling that NLI is not entitled to any post-petition interest.[2]

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2. We will also affirm the District Court's application of the Katzes' settlement payment of $250,000 to the principal amount of the loan debt. A creditor may only apply payments on a debt to post-petition interest and costs to the extent the debt is oversecured, and must otherwise apply such payments to reduce the principal of the debt. *See In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 201 (3d Cir.1995). Unless interest accrues on a debt during bankruptcy, there are no "theories that would support the allocation of post-petition payments to something other than a reduction of the principal debt." *Id.* at 211. The District Court correctly concluded that NLI's claim as to the DeNofas was not oversecured and did not accrue post-petition interest, and therefore correctly applied the Katzes' payment to reduce the principal of the loan debt.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 17, 2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 04-1686

IN RE:
MICHAEL E. DENOFA
TOMMYE DENOFA,

Debtors

MICHAEL E. DENOFA;
TOMMYE DENOFA

v.

NATIONAL LOAN INVESTORS, L.P.,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 02-cv-05524)
District Judge: Honorable John W. Bissell

Submitted Under Third Circuit LAR 34.1(a)
January 28, 2005

Before: SCIRICA, *Chief Judge*, RENDELL and FISHER, *Circuit Judges*.

Appendix B

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on January 28, 2005. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this, Court that the order of the District Court entered March 3, 2004, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court. Costs taxed against Appellant.

ATTEST:

s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: February 17, 2005

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MARCH 3, 2004

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 02-5524(JWB)

In re:

MICHAEL E. DeNOFA and
TOMMYE DeNOFA, his wife,

Debtors.

MICHAEL E. DeNOFA and
TOMMYE DeNOFA,

Appellants,

v.

NATIONAL LOAN INVESTORS, L.P.,

Appellee.

ORDER

This matter comes before the Court pursuant to the motion of National Loan Investors, L.P. (NLI) for reconsideration of this Court's opinion and order dated January 27, 2004. Such motions in this Court, formally titled

motions for reargument, are governed by Local Civil Rule 7.1(g). Such a motion may be brought if the movant presents to the Court "concisely the matters or controlling decisions which counsel believes the judge ... has overlooked." (*Id.*) A motion for reargument (or reconsideration) may not be employed as an opportunity merely to emphasize points of disagreement with the questioned decision. Nor may it be used merely to reassert positions previously advanced and actually addressed by the district court. In short, such motions are not a substitute for the appellate process which, when ripe, will take place in the United States Court of Appeals for the Third Circuit should NLI choose to pursue its position in that forum. As the appellants emphasize in their brief in opposition to the present motion, NLI does not support its present motion by directing the Court's attention to "any matters or controlling decisions which ... the judge ... has overlooked." (L. Civ. R. 7.1(g)). Rather, the present motion is little more than a representation of prior arguments fully considered and addressed in this Court's Opinion of January 27, 2004.

Now therefore, it is on this 3rd day of March, 2004,

ORDERED that the motion of appellee National Loan Investors, L.P., for reconsideration of this Court's Opinion and Order dated January 27, 2004 be, and the same hereby is, in all respects denied.

s/ John W. Bissell
JOHN W. BISSELL
Chief Judge
United States District Court

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JANUARY 27, 2004

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 02-5524
(Bankruptcy Case: 89-4790 (DHS)

In re:

MICHAEL E. DeNOFA and
TOMMYE DeNOFA, his wife,

Debtors.

MICHAEL E. DeNOFA and
TOMMYE DeNOFA, his wife,

Appellants,

v.

NATIONAL LOAN INVESTORS, L.P.

Appellee.

OPINION

BISSELL, *Chief Judge*

This matter is before the Court on an interlocutory appeal from an order of the United States Bankruptcy Judge Donald H. Steckroth in an adversary proceeding brought by Michael

E. and Tommye DeNofa (the "DeNofas") against National Loan Investors, L.P. ("NLI") and the Federal Deposit Insurance Corp. ("FDIC"). Specifically, the DeNofas appeal from Judge Steckroth's determination as to whether and how interest should be calculated on NLI's claim against the DeNofas and whether the DeNofas are entitled to a credit against the allowed claim of NLI for a payment made by a co-debtor.

FACTS

I. *Background*

The DeNofas' obligations to NLI grew out of loans made by Continental Illinois National Bank and Trust co. of Chicago ("Continental Illinois"), predecessor-in-interest of the Federal Deposit Insurance Corporation ("FDIC") and then NLI, to DAK Manufacturing Corporation ("DAK"), of which Mr. DeNofa was a co-owner.

A. *The Initial Loan to DAK Manufacturing Corporation Guaranteed by DeNofa and Katz*

Pursuant to a "Loan and Security Agreement" dated October 28, 1983, Continental Illinois agreed to lend DAK certain sums not to exceed the aggregate total of $1,000,000.00. The Loan Agreement provided that interest would be charged on the outstanding balance of the loan. ("Joint Exhibit and Witness List of National Loan Investors and the Federal Deposit Insurance Corporation" originally filed with the Bankruptcy Court on July 15, 1998, [hereinafter "NLI's Exh."] 2, ¶ 2.) The Loan Agreement further provided that DAK's failure to repay the liabilities per the Agreement

would constitute default under that Agreement, (*id.*, ¶ 9), and that DAK would be liable for the lender's costs, including attorneys' fees and expenses in the event of default (*id.*, ¶ 3). The Continental Illinois loan was secured by DAK's accounts, equipment and other property. Continental Illinois was also granted a secured interest in DAK's interest in the real property known as 475-485 Boulevard, Elmwood Park, New Jersey (the "Elmwood Park Property"). (*Id.*, ¶ 3.)

Michael E. DeNofa and Steven J. Katz, both officers and 50% shareholders of DAK in and prior to October 1983, signed numerous corporate and loan documents in connection with the issuance of the Loan and Security Agreement. Mr. DeNofa executed an unlimited Guaranty whereby he guaranteed the prompt payment of all liabilities of DAK to Continental Illinois under the Loan and Security Agreement. (NLI's Exh. 3.) Mr. DeNofa's guaranty provided in part:

> [T]he undersigned hereby unconditionally guarantee(s) . . . the full and prompt payment when due, whether by acceleration or otherwise, and at all times thereafter, of all obligations of the Debtor to the Bank, howsoever created, arising or evidenced, whether direct or indirect, absolute or contingent or now or thereafter existing, or due or to become due. . . . The right of recovery against the undersigned under this guaranty is, however, limited to the amount of UNLIMITED Dollars ($ _____), plus interest on such amount and plus all expenses of enforcing this guaranty.

(*Id.*) As security for the Guaranty and the obligations of DAK under the Loan and Security Agreement, Michael DeNofa

and Tommye DeNofa each executed and delivered to Continental Illinois a mortgage on property known as 770 Scott Drive, River Vale, New Jersey (the "Mortgaged Property"). Referring specifically to the DAK Loan and Security Agreement and Mr. DeNofa's guaranty, the mortgage provided:

> the intent and purpose of this Mortgage is to secure (I) all the obligations of Mortgagors pursuant to the aforementioned Guaranty, (ii) the obligations of DAK under the aforementioned Agreement and (iii) all replacements, renewals, modifications, amendments, extensions or increases of the Guaranty and Agreement. . . .

(NLI's Exh. 4.)

Steven Katz also executed an unlimited Guaranty to Continental Illinois in October 1983. As security for the Guaranty and the obligations of DAK under the Loan and Security Agreement, Steven Katz and Edith Katz each executed and delivered to Continental Illinois a mortgage on property known as 5 Cardinal Court, Montvale, New Jersey.

B. *The DAK Manufacturing Corporation Bankruptcy Proceeding*

On or about November 7, 1985, DAK filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code. On December 2, 1985, DAK filed schedules and a statement of financial affairs. At Schedule

A-2, DAK listed a secured debt to Continental Illinois in the amount of $740,788.00. The Schedule states that Continental Illinois' obligation is secured by a "1st perfected lien on all debtor's assets except those above. Includes inventory, a/r, equip., & lien on int. in net equity of lease options at 475/485 Blvd., Elmwood Pk., NJ." The Schedule further states that the market value of the assets which secured the Continental Illinois debt at the time of the DAK bankruptcy filing was $1,278,469.20. Thus, at the time of the DAK bankruptcy filing, NLI asserts Continental Illinois was oversecured by over $500,000.00.

Within days of filing its Chapter 11 proceeding, DAK moved for the entry of an order authorizing it to borrow money and obtain other financial accommodations from Continental Illinois and to give security therefore. DAK's request was granted by an order entered November 12, 1985 authorizing the debtor to obtain credit from Continental Illinois pursuant to 11 U.S.C. § 364. Pursuant to the November 12, 1985 order, Continental Illinois made significant post petition loans to DAK.

DAK ultimately requested that the Bankruptcy Court approve an assumption of the Elmwood Park lease and option coupled with a subsequent sale of the property to a third party. On January 23, 1986, the Bankruptcy Court approved the sale of the Elmwood Park Property for $2 million. At the time the sale was approved, DAK would have netted $750,000.00 from the transaction after payment of the option provided in the lease. (Appx. Vol. I, at Pa 43 (December 10, 1998 Tuohey Op., at 5.)) However, by the time of the actual sale, it became apparent that there were substantial

environmental problems encumbering the Elmwood Park Property. As a result, the DAK portion of the sale proceeds, $750,000.00, was placed in an escrow account. There followed years of litigation and negotiations with various state and federal environmental agencies dealing with the cleanup of the property. (*Id.*)

On January 9, 1987, DAK filed an adversary proceeding with the Bankruptcy Court seeking a declaratory judgment as to the respective rights and liabilities of DAK, Realco, Ltd. and Lazzaro and Jean Fattori regarding the Elmwood Park Property, including their respective responsibilities and liabilities with regard to cleanup of the property under the New Jersey Environmental Cleanup and Recovery Act. During the proceedings, DAK also sought a declaratory judgment as to the FDIC's rights regarding DAK's share of monies received from the Elmwood Park Property. The DAK loan package had been conveyed to the FDIC, which assumed all of the rights and obligations of Continental Illinois, on or about June 16, 1987, and thereafter participated actively as the successor in interest to Continental Illinois in the DAK, DeNofa and Katz bankruptcy proceedings. Realco and the Fattoris filed a counterclaim, cross-claim and third party complaint for damages against Michael DeNofa and Steven Katz for cleanup of the Elmwood Park Property. Apex Majestic Limited Partnership also filed a counterclaim, cross-claim and third party complaint seeking compliance with cleanup regulations by DAK, Realco, the Fattoris, Steven Katz and Michael DeNofa, indemnity from DAK for claims brought by Realco and the Fattoris against Apex, and damages against Katz and DeNofa caused by DAK's failure to comply with the cleanup regulations.

Appendix D

The parties entered into a Settlement Agreement, involving the liquidation of the DAK estate, approved by an order of the Bankruptcy Court settling the adversary proceeding dated March 30, 1995. The Settlement Agreement provided that a remaining portion of the settlement funds and DAK's initial distribution shall be paid to FDIC subject to the claims of Apex, real estate brokers and the debtor's counsel for legal fees, as well as other claims which could be determined superior to FDIC's superpriority claims, other than those specifically set forth in the Settlement Agreement. As a result of the Settlement Agreement, the FDIC received a total of $455,817.01 in June and August of 1995 - the net proceeds from the sale of the Elmwood Park Property after closing costs, legal fees and environmental cleanup costs.

C. *The DeNofa Bankruptcy Proceeding*

On August 17, 1988, Continental Illinois filed a foreclosure proceeding on the DeNofas' Mortgaged Property in the Superior Court of New Jersey, Chancery Division, Bergen County. However, on June 20, 1989, prior to the entry of judgment in the foreclosure action, the DeNofas filed a Chapter 11 reorganization proceeding. In Schedule B of the bankruptcy schedules, the DeNofas valued the Mortgaged Property at $300,000.00. (NLI's Exh. 24 at Schedule B-1.) They also listed a first mortgage, superior to the mortgage originally held by Continental Illinois, with an outstanding amount of $25,000.00. (NLI's Exh. 24 at Schedule A-2.) Thus, at the time of the bankruptcy filing, the DeNofas reflected equity in the Mortgaged Property of $275,000.00

available to satisfy the Loan and Security Agreement, Mortgage and Guaranty held, at this point, by the FDIC.[1]

On or about August 18, 1989, Continental Illinois filed a proof of claim in the DeNofa bankruptcy proceeding in the amount of $866,266.88. The DeNofas note that, as required by bankruptcy law, this was the amount due on the date of filing in the DeNofa case, and included principal and interest in arrears through the filing date. The proof of claim stated that the amount claimed to be due was an unsecured claim except to the extent that the mortgage held by Continental

---

1. The DeNofas argue on appeal that the value of the Mortgaged Property at the time they filed the Chapter 11 petition was $250,000.00, and therefore, the equity in the property available to satisfy the Loan and Security Agreement, Mortgage and Guaranty held, at that time, by the FDIC was $225,000.00. (Brief of Plaintiffs/ Appellants Michael E. DeNofa and Tommye DeNofa [hereinafter "Appellants' Brief"], at 3; Reply Brief of Appellants Michael E. DeNofa and Tommye DeNofa [hereinafter "Appellants' Reply"], at 10.) Bankruptcy Court Judge Tuohey, in his December 10, 1998 Opinion following a trial in an Adversary Proceeding involving the DeNofas, the FDIC and NLI, stated that the DeNofas' bankruptcy schedules reflected a fair market value for the DeNofas' home of $250,000.00. (Appx. Vol. I, at Pa 48 (December 10, 1998 Tuohey Op., at 10.)) However, on appeal from Judge Tuohey's decision, this Court determined that Schedule B-1 of the DeNofas' bankruptcy schedules indicates that the DeNofas valued the Mortgaged Property at $300,000.00, and therefore, reflected equity in the Mortgaged Property of $275,000.00 at the time of filing. (April 12, 1999 Bissell Op., at 10.) Upon another review the bankruptcy schedules filed by the DeNofas, this Court determines that Judge Steckroth's finding that the fair market value of the Mortgaged Property at the time the DeNofas filed their Chapter 11 petition was $300,000.00 is not clearly erroneous, and therefore, is upheld by this Court on appeal.

Illinois on the Mortgaged Property was sufficient to satisfy the claim. No other assets, such as DAK's assets or the Katzes' assets were mentioned in the proof of claim. (NLI's Exh. 26; Appx. Vol. I, at Pa. 13.) Since the value of the mortgage was $225,000.00 at that time, the DeNofas assert that Continental Illinois was a secured creditor in the amount of $225,000.00 and an unsecured creditor in the amount of $641,266.88. (Appellant's Brief, 4.)

D. *The Katz Bankruptcy Proceeding*

In or around December 1989, the Katzes filed a Chapter 11 bankruptcy proceeding. In their bankruptcy schedules, they reflected their ownership of 5 Cardinal Court, Montvale, New Jersey, valued at $350,000.00, and specified first and second mortgages of $54,000.00 that were superior to the mortgage granted to Continental Illinois. Thus, they specified equity in the real property mortgaged to Continental Illinois of $296,000.00 as being available to satisfy the Loan and Security Agreement, Mortgage and guaranty then held by the FDIC. The Katzes' bankruptcy proceeding was subsequently dismissed with no discharge granted pursuant to the Bankruptcy Code.

E. *Litigation in the DeNofa Bankruptcy Proceeding*

The Court notes that pursuant to an "Assignment of Mortgage" dated December 16, 1996, the FDIC assigned the Mortgage, Guarantee and Loan and Security Agreement to NLI. Since that time, NLI has actively participated in the DeNofa bankruptcy proceeding as the successor in interest to the FDIC.

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On March 24, 1997, NLI filed a motion seeking relief from the automatic stay so as to continue with a foreclosure action or, in the alternative, for dismissal of the DeNofa reorganization proceeding. In response to NLI's motion, on April 27, 1997, the DeNofas filed an adversary proceeding seeking from NLI (1) an accounting as to the nature, extent and validity of NLI's claim, and (2) a reduction in the amount owed by the DeNofas because of an alleged oral agreement made on January 31, 1991 with a representative of the FDIC. NLI and the FDIC denied the existence of any oral settlement agreement. As a result of the adversary proceeding, which questioned the amount of the debt to NLI, the Bankruptcy Court never ruled on NLI's motion to stay and/or motion to dismiss.

On April 27, 1998, NLI moved for summary judgment in the adversary proceeding on the issue of the DeNofas' alleged oral settlement agreement. In an order dated June 10, 1998, Bankruptcy Court Judge Tuohey granted partial summary judgment in favor of NLI on all of the DeNofas' claims relating to an alleged settlement or modification of the subject loan documents, finding that no firm settlement agreement fixing the DeNofas' liability had been reached. (June 10, 1998 Touhey Op., at 47-49.) Thereafter, the Bankruptcy Court conducted a trial over a period of several days extending from July though October 1998. NLI alleged that, as of June 30, 1998, the amount due to NLI by the DeNofas on the Guaranty was $1,064,770.33. NLI asserted that as the value of the collateral securing the indebtedness owed to Continental Illinois/FDIC/NLI was greater than the indebtedness as of the DAK petition date and as of the DeNofa petition date (i.e., the claim of the creditor was

oversecured), NLI was entitled to recover post petition interest, costs and fees pursuant to the subject loan documents and 11 U.S.C. § 506(b).[2] Thus, on July 10, 1998, NLI filed an amended proof of claim in the DeNofa proceeding in the amount of $1,064,770.33 which included interest due after the DeNofa bankruptcy filing because NLI believed itself to be an oversecured creditor.

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2. 11 U.S.C. 506(b) governs the allowance of post-petition interest, fees, costs and charges as part of a secured claim. In general those items will not be allowed as part of a secured claim unless the claim is oversecured, meaning that the relevant value of the collateral exceeds the amount of the claim after taking into account any amounts chargeable to the collateral under 11 U.S.C. § 506(c). If a claim is oversecured, postpetition interest will be allowed at the rate specified in the relevant contract, if any, or under otherwise applicable nonbankruptcy law. The amount of a creditor's claim is typically determined as of the petition date, and includes the principal amount of the obligation plus all matured prepetition interest, fees, costs and charges owing as of the petition date. The creditor would be allowed to recover post-petition interest and allowed fees, costs or charges up to the amount that the claim is oversecured. Any such claim greater than that amount would constitute an unsecured claim against the estate, and any excess post-petition interest would be subject to disallowance under section 11 U.S.C. § 502(b)(2). The question of how to value the underlying collateral is resolved by 11 U.S.C. § 506(a), and depends on (1) the purpose of the valuation, and (2) the proposed use or disposition of the collateral. Therefore, the relevant standard may vary depending on whether the underlying proceeding is (1) a request for adequate protection, (2) a motion for relief from stay, (3) a confirmation hearing at which the amount of the secured creditor's claim is to be fixed for cram down purposes, or (4) some other type of proceeding. In addition, because these different proceedings implicate different methods of valuation, a claim may be found to be undersecured in one context, but oversecured in another within the same case.

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In his December 10, 1998 Opinion following the completion of the trial, Judge Tuohey stated "the Court specifically finds that interest should *not* continue to accrue once the DeNofa Bankruptcy was filed in 1989." (Appx. Vol. I, at Pa 47-48 (December 10, 1998 Tuohey Op., at 9-10.)) Thus, the Bankruptcy Court fixed the amount due on the NLI secured debt in the DeNofa Chapter 11 at $323,615.69. (Apex. Vol. I, at Pa 48 (December 10, 1998 Tuohey Op., at 10.)) Judge Tuohey did not base his decision, however, on a finding that NLI was not an oversecured creditor at the time the DeNofas filed a Chapter 11 bankruptcy proceeding. Indeed, Judge Tuohey ruled that a consideration of this issue was moot. (Appx. Vol. I, at Pa 60-61 (December 10, 1989 Tuohey Op. at 2223.)) Instead, though having previously ruled that the parties had not entered an agreement, in his December 10, 1998 Opinion Judge Tuohey held that the evidence produced at trial supported a finding that the parties had entered an oral contract freezing the accruing of interest at the date the DeNofas filed a Chapter 11 petition. Judge Tuohey stated that at the time the DeNofas filed their bankruptcy petition,

> the parties were well aware that the primary collateral, that is, the DAK real estate, was encumbered with a very substantial pollution problem. The entire real estate sale proceeds were in an escrow account and had been tied up in that escrow account since January 23, 1986 when the Bankruptcy Court approved the real estate sale. Thus, by 1989, the Court notes that the delays in closing had continued for well over three years. This fact, coupled with the clear testimony that

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> . . . Katz and DeNofa [cooperated] in trying to maximize the recovery for the FDIC on the real estate proceeds and thus [helped] in answering the pollution problems, compels the Court to conclude that interest should end in June 1989 when the DeNofas filed for Bankruptcy.

(Appx. Vol. I, at Pa 47-48 (December 10, 1998 Tuohey Op., at 910.)) Judge Tuohey reasoned that if interest had been allowed to accrue, the total payoff figure on the DAK loan, including principal and interest, would have been in excess of $1,000,000.00 by December 1991. The only hope the Katzes and DeNofas had of saving their respective residences required that the interest on the debt be frozen in exchange for their cooperation with FDIC in its attempts to maximize the payment to it out of the $750,000.00 escrowed sale proceeds. (Appx. Vol. I, at Pa 50-51 (December 10, 1998 Tuohey Op. at 12-13.)) Thus, the Court opined that the only way the "bargained for" and received cooperation of Katz and DeNofa makes sense is if there was a mutual understanding between the FDIC and the DeNofas and Katzes that if they cooperated with the FDIC during the ten year environmental cleanup and legal entanglements arising from the sale of the DAK property, interest would be frozen on the debt. (Appx. Vol. I, at Pa 50 (December 10, 1998 Tuohey Op., at 12.)) Since Judge Tuohey rejected the concept of accruing interest, the total amount owed to NLI remained $866,266.88 as claimed by Continental Illinois on August 18, 1989 in the DeNofa proceeding. Judge Tuohey applied the $445,817.00 the FDIC received from the DAK liquidation and all adequate protection payments made by DeNofa and Katz to find that as of June 30, 1998, the remaining debt

owed totaled $323,615.69. However, the Court further found that the DeNofas were liable for only one half of that amount, $161,807.00, because the security for the debt was divided between the DeNofas' mortgaged property and the Katzes' mortgaged property. (Appx. Vol. I, at Pa 60 (December 10, 1998 Tuohey Op. at 22.)) Judge Tuohey therefore ordered, inter alia, that the amount of the DeNofas' liability secured by the mortgage held by NLI is fixed at $161,807.00 and that the DeNofas' adequate protection payments would be increased from $500.00 per month to $1,500.00 per month, on an interim basis, pending hearing on the confirmation of the DeNofas' proposed Chapter 11 Plan. (Appx. Vol. I, at Pa 25-26 (December 10, 1998 Tuohey Order.))[3]

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3. Judge Tuohey's December 10, 1998 Order states in pertinent part: It is on this 10th day of December, 1998,

> Ordered that the Complaint against defendant FDIC be dismissed for lack of subject matter jurisdiction due to failure of the Plaintiffs to meet the requirements of the Federal Tort Claims Act, particularly, 28 U.S.C. section 2675, requiring exhaustion of administrative remedies; and it is further
>
> Ordered that the amount of debtors' liability secured by the mortgage held by NLI upon their Riverdale, New Jersey residence is fixed at $161,807.00; and it is further
>
> Ordered that beginning on the first day of the month following entry of the within order, debtors' adequate protection payments to NLI are to be increased from $500.00 per month to $1,500.00 per month, on and interim basis, pending hearing on the confirmation of the debtors' proposed Chapter 11 Plan; and it is further

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Both NLI and the DeNofas filed notices of appeal from the Bankruptcy Court decision with the United States District Court for the District of New Jersey. The DeNofas also filed a notice of appeal of an oral order of the Bankruptcy Court entered from the bench on December 21, 1998 denying as moot the DeNofas' November 20, 1998 motion to discontinue adequate protection payments and obtain a refund.

After hearing oral argument on the matter, this Court entered an order on April 12, 1999 reversing the decision of the Bankruptcy Court to the extent that it (1) froze interest as of the DeNofas' bankruptcy, (2) reduced the amount of debt secured by the DeNofa mortgage, and (3) dismissed the DeNofas' claim against the FDIC under 11 U.S.C. § 506(c) on sovereign immunity grounds. The Court remanded the matter to the Bankruptcy Court for further proceedings and/or consideration in accordance with its opinion.

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> Ordered that said proposed Chapter 11 Plan, with provision for satisfaction of payment, on the NLI mortgage, shall be filed within 60 days following entry of the within opinion; and it is further
>
> Ordered that for the reasons stated in the accompanying Opinion, defendants['] claim for interest pursuant to 11 U.S.C. section 506 (b) be and hereby is denied; and it is further
>
> Ordered that for the reasons stated in the accompanying opinion, plaintiff's claim for compensation pursuant to 11 U.S.C. section 506(c) be and the same hereby is denied.

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The DeNofas filed a motion for reconsideration on April 26, 1999 which this Court denied by order entered December 16, 1999. On January 19, 2000, the DeNofas filed a notice of appeal of this Court's opinion and order of April 12, 1999, which the Third Circuit dismissed on November 21, 2000.

On January 30, 2000, NLI filed a motion with the Bankruptcy Court to dismiss the DeNofa bankruptcy proceeding. Bankruptcy Judge Steckroth determined that that court did not have jurisdiction to hear the motion in the main bankruptcy case because the DeNofas' appeal was still pending in the Third Circuit. NLI appealed the decision of the Bankruptcy Court but this Court never ruled on the merits of the appeal from the jurisdictional determination because the Third Circuit dismissed the DeNofas' appeal on November 21, 2000 and this Court thereafter remanded the motion to dismiss to the Bankruptcy Court for adjudication on the merits because a jurisdictional issue no longer existed.

In July 1999, the Katzes and NLI entered into a settlement agreement which resolved NLI's foreclosure action against the Katzes by way of a Final Consent Judgment of Foreclosure entered pursuant to a Stipulation of Settlement. The Katzes acknowledged that they owed $1,025,597.77 to NLI as of July 12, 1999, however, the settlement provided for NLI's acceptance of $250,000.00 as a discounted settlement amount in satisfaction of the acknowledged indebtedness provided that full payment was received before September 8, 1999. (Appx. Vol. I, at Pa 166 (Certification of William Smith [hereinafter "Smith Cert."] Exh. A.)) The Katzes paid the discounted settlement amount prior to that date.

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The Bankruptcy Court carried the NLI's motion to dismiss the DeNofa bankruptcy proceeding to September 13, 2001, later adjourned to September 25, 2001, to be heard in conjunction with the adversary proceeding scheduled for the same date. The DeNofas filed a motion for partial summary judgment in the adversary proceeding requesting that the Bankruptcy Court fix the amount of NLI's claim at $24,115.59. The DeNofas contended that the Bankruptcy Court had fixed the amount of NLI's claim at $323,615,59 as of June 30, 1998 and that this Court's opinion and order made that claim final. Therefore, the DeNofas sought to reduce that claim by the $250,000.00 paid by the Katzes and the amount of adequate protection payments made by the DeNofas since June 30, 1998.

NLI cross-moved for summary judgment asserting that there was no oral loan modification agreement which froze the running of interest on the indebtedness; that NLI is an oversecured creditor, and that Michael DeNofa was not entitled to compensation from NLI or FDIC. More specifically, in its cross-motion, NLI requested summary judgment establishing the amount of its claim as $1,064,770.33 and establishing NLI as an oversecured creditor.

Granting NLI partial summary judgment, Judge Steckroth found that NLI was an oversecured creditor and that the Katzes' payment could not be used to offset the amount of the allowed claim. However, Judge Steckroth found that the DeNofas were entitled to a credit against NLI's allowed claims in the amount of the adequate protection payment that have been made. Consequently, the court found

that the amount due to NLI was $1,015,270.33. Judge Steckroth held over for limited discovery and trial the issue as to whether there was an oral loan modification freezing the running of interest.[4]

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4. The October 16, 2002 Order states in full:

> This matter having been opened to the court upon the motion by debtors seeking partial summary judgment and the cross-motion of defendant [NLI] and the court having heard and considered the arguments of counsel, and for the reasons set forth in the court's opinion dated October 16, 2002, and good cause shown, It is, on this 16th day of October, 2002,
>
> Ordered that the allowed claims of NLI in the sum of $323,615.69 was oversecured on the date of debtors' petition pursuant to 11 U.S.C. § 506(b); and it is further
>
> Ordered that debtors are not entitled to a credit against the allowed claim of NLI for $250,000 payment made by Steven Katz; and it is further
>
> Ordered that debtors are entitled to a credit against the allowed claims of NLI for the adequate protection payments made; and it is further
>
> Ordered that Count Two of the Complaint is dismissed; and it is further
>
> Ordered that the balance of NLI's motion for partial summary judgment is denied without prejudice pending further hearing and order of the court; and it is further

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On October 28, 2002, the DeNofas filed a notice of appeal of the Bankruptcy Court's October 16, 2002 decision. On December 18, 2002, NLI filed a notice of motion to dismiss the appeal on the grounds that the October 16, 2002 Order was interlocutory and did not involve a controlling question of law as to which there was substantial ground for difference of opinion nor would an immediate appeal materially advance the ultimate termination of the litigation. The DeNofas cross-moved for leave to appeal from an interlocutory order. On January 28, 2003, this Court denied NLI's motion to dismiss the appeal and exercised its discretion to grant the DeNofas leave to appeal from an interlocutory order.

II. *The Appeal Presently Before the Court*

The DeNofas' appeal from the October 16, 2002 Order of the Bankruptcy Court, granting NLI partial summary judgment, is now before this Court. The DeNofas focus their brief on appeal on the arguments that (1) NLI's claim was undersecured as a matter of law and ceased to accrue interest after the DeNofas' petition date pursuant to 11 U.S.C. § 506 and (2) Judge Steckroth erred in not applying the Katzes' payment to reduce the claim held by NLI in the same manner Judge Tuohey did. Appellee NLI counters that the Bankruptcy Court properly determined the amount of NLI's claim in light

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> Ordered that parties shall appear before the court on October 31, 2002, as 10:00 a.m., for the purpose of scheduling limited discovery, if necessary, and a trial on the issue of whether the parties agreed to freeze interest on the allowed claim at the January 1991 conference.

of supported factual findings and the proper application of 11 U.S.C. § 506 and did not err by not applying the Katzes' payment to reduce NLI's claim.

ANALYSIS

I. *Standard of Review of Appeal from a Bankruptcy Court Decision*

In reviewing a Bankruptcy Court decision, the District Court must defer to the Bankruptcy Court's findings of fact. The District Court may reverse only clearly erroneous findings of fact. Fed. R. Bankr. P. 8013; *In re Stenardo*, 91 F.2d 1089, 1094 (3d Cir. 1993); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 38-39 (3d Cir. 1989). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The District Court reviews legal conclusions of the Bankruptcy Court de novo on appeal. *J.F. Fyfe, Inc. v. Breadco Supply Corp.*, 891 F.2d 66, 69 (3d Cir. 1989).

II. *Whether the Bankruptcy Court Erred in Finding that Appellee NLI was an Oversecured Creditor*

Central to this Court's determination of whether NLI was an oversecured creditor such that interest accrued on its claim is the interpretation of Section 506 of the Bankruptcy Code, which provides in pertinent part:

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> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.
>
> (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. §§ 506(a) and (b).

The Bankruptcy Court began its analysis of the amount of NLI's claim under 11 U.S.C. § 506 by noting that the holder of an oversecured claim can recover, in addition to the full prepetition amount of the claim, interest on such claim and

any reasonable fees, costs, or charges provided for under the subject agreement. (Appx. Vol. II, at 231 (October 16, 2002 Steckroth Op., at 13 (citing 11 U.S.C. § 506(b); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989))). The Bankruptcy Court found that the appropriate date for fixing valuation of collateral to determine secured status is the date on which the bankruptcy petition was filed and the case was commenced. (*Id.*) (citing *United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988); *In re Whalley*, 202 B.R. 58 (Bankr. W.D. Pa. 1996)).

The DeNofas argued that since the fair market value of their residence was substantially less than the amount due NLI when the DeNofas filed their Chapter 11 petition (the presumed "valuation date"), NLI's claim was undersecured; therefore, interest did not accrue post-petition and cannot be allowed under 11 U.S.C. § 506(b). NLI argued, and the Bankruptcy Court held, that the value of all the collateral that secured the loan, i.e., the DAK, Katz and DeNofa properties, must be aggregated to determine whether a claim is oversecured. As the value of the three properties together ($1,026,817.00) exceeded the amount of NLI's claim at the valuation date ($323,615.69), the Bankruptcy Court found that NLI was an oversecured creditor entitled to post-petition interest pursuant to 11 U.S.C. § 506(b).[5]

5. The Bankruptcy Court noted that interest would be allowed only if, upon further proceedings, the Bankruptcy Court found that the parties had not reached an agreement providing for the freezing of the interest. The determination of whether such an agreement exists as the DeNofas allege, is pending the resolution of the instant appeal. If this Court finds on appeal that NLI was not an oversecured creditor, and thus, no interest accrued on its claim, the issue of whether the parties agreed to freeze interest on the claim would be moot.

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The DeNofas now argue on appeal that the valuation date for determining whether a claim is oversecured is not necessarily the date that the Chapter 11 petition is filed, and more importantly, that the collateral should not be aggregated to determine oversecured status, but rather the "property" to which 11 U.S.C. § 506 (b) refers is only that in which the estate against whom the claim has been filed has an interest.

A. *Date of Valuation*

The Bankruptcy Court held that "the appropriate date for fixing valuation of collateral to determine secured status is the date on which the bankruptcy petition was filed and the case was commenced." (Appx. Vol. II, at Pa 23 (October 16, 2002 Steckroth Op., at 13.)): Judge Steckroth relied primarily on *In re Whalley*, 202 B.R. 58 (Bankr. W.D. Pa. 1996), in which the Bankruptcy Court for the Western District of Pennsylvania found that the date of the bankruptcy filing was the applicable date for valuing a debtor's property which was subject to a creditor's lien.

The DeNofas assert, however, that there is no single time when the right to obtain post-petition interest accrues. In support of their assertion, the DeNofas cite *Matter of T-H New Orleans Ltd. Partnership*, 116 F.3d 790, 798 (5th Cir. 1997), in which the Fifth Circuit held that for the purposes of determining whether a creditor is entitled to accrue interest under 11 U.S.C. § 506 (b) in the circumstances where the collateral's value is increasing and/or the creditor's allowed claim has been or is being reduced by cash collateral, such that at some time prior to confirmation of the debtor's plan the creditor may become oversecured, valuation of the

collateral and the creditor's claim should be flexible and not limited to a single point in time, such as the petition date or confirmation date. *Matter of T-H*, 116 F.3d at 798.

However, the holding of *Matter of T-H* is tailored to factual circumstances so different from the case at bar that the holding has no persuasive effect here. The bankruptcy court in *Matter of T-H* initially found the secured creditor undersecured as of the petition date. However, post-petition, as the value of the collateral was increasing and the claim was decreasing with cash collateral payments of nearly $4.7 million, the claimant filed a motion for redetermination of its secured status upon which the bankruptcy court found the debt changed from undersecured to oversecured. *Id.* As the *Matter of T-H* court noted, the claimant "bears the ultimate burden to prove by a preponderance of evidence that . . . its claim was oversecured, to what extent, and for what period of time." *Id.*; *see also In Re Toy King Distrib. Inc.*, 256 B.R. 1, 187 (quoting *Matter of T-H*, 116 F.3d at 798). In the case at bar, NLI asserts that its claim was oversecured as of the date the DeNofas filed their Chapter 11 petition. There is no indication from either party that the value of the collateral has increased significantly or that the amount of the claim has decreased significantly since the DeNofa bankruptcy proceedings commenced. Also, neither party has moved for a redetermination of the value of the collateral securing the loan.

Moreover, while the Court acknowledges that assets may be valued in accordance with 11 U.S.C. § 506(a) at different points in time depending on the particular context in which the valuation is to take place, *Collier on Bankruptcy*

(15th ed. 2002), ¶ 506.03[10], for the purposes of 11 U.S.C. § 506(b), the amount of a creditor's claim is typically determined as of the petition date. *Id.* ¶ 506.04[1]. Whether a claim is oversecured under 11 U.S.C. § 506(b) depends on the value of the collateral. Therefore, it follows that at least the initial valuation of collateral is typically made at the time the bankruptcy petition is filed to determine whether the claimant is entitled to post-petition interest from that point forward. *See In re Keystone Camera Products Corp.*, 126 B.R. 177, 183 (Bankr. D.N.J. 1991) (holding that 11 U.S.C. § 506(b) provides that the amount of a claim shall be determined as of the date of the filing of the bankruptcy petition and the value of the property should also be determined as of the petition date); *Matter of Kennedy Mortgage Co.*, 23 B.R. 466, 469 (Bankr. D.N.J. 1982) (holding that, as a general rule, the value of collateral is to be determined as of the date the petition under the Bankruptcy Code is filed). Accordingly, the Court finds that the Bankruptcy Court did not err in holding that the appropriate date for fixing valuation of collateral to determine secured status is the date on which the DeNofa bankruptcy petition was filed.

The Court notes that the DeNofas also assert that "it really does not matter at which point in time the value of the collateral in this case is measured against the claim. . . . All of NLI's appraisals showed that the claim, without the Katz payment of $250,000, was more than the value of the home." (Appellants' Brief, at 9-10). Thus, it appears that the only issue determinative of NLI's secured status in relation to its claim against the DeNofas is whether just the DeNofa property should be included for the purposes of calculating

the value of collateral, or whether the DAK, Katz and DeNofa properties should be aggregated for that calculation.

B. *Aggregation of Collateral*

The Bankruptcy Court held that the aggregation of all the collateral securing the loan was the proper method of determining whether the secured party was oversecured under 11 U.S.C. § 506(b). Judge Steckroth relied primarily on *In Re Ladycliff College*, 56 B.R. 765 (S.D.N.Y. 1995). In *Ladycliff*, the Bankruptcy Court for the Southern District of New York noted:

> Section 506(b) states in part "[t]o the extent that an allowed secured claim is secured by *property* the value of which . . . is greater than the amount of such claim . . . there shall be allowed . . . interest on such claim . . ." 11 U.S.C. § 506(b). The real question therefore is the "property" which must be valued.

Ladycliff, 56 B.R. at 768 (emphasis added). The *Ladycliff* court concluded that aggregation of all collateral securing the loan was the proper method of determining whether the secured party was oversecured. However, this Court finds that not only is *Ladycliff* not binding on this Court, but also, it is not even persuasive because it addresses only circumstances involving one debtor and an unusual set of facts requiring the interpretation of the language of a mortgage.

Nonetheless, NLI argues that the Bankruptcy Court properly included all of the collateral that secured the DAK loan in determining that NLI's claim against the DeNofas was oversecured. However, NLI has provided the Court with further rationale than that relied upon by Judge Steckroth. While 11 U.S.C. § 506(a) states "[a]n allowed claim of a creditor secured by a lien on property *in which the estate has an interest* . . . is a secured claim to the extent of the value of such creditor's interest *in the estate's interest in such property*," NLI contends that many courts have concluded that it is the value of all the collateral securing the loan which determines the secured status of the claimant. NLI specifically relies on *In re Arnette*, 156 B.R. 366 (Bankr. D. Conn. 1993), holding:

> "subsection (a) of § 506 provides that a claim is secured only to the extent of the value of the property on which the lien is fixed." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 239, 149 S. Ct. 1026, 103 L. Ed. 2d 290 (1998) (dictum). The face "value of such creditors' interest" has been defined as "the value of the collateral." *United States Savings Ass'n v. Timbers of Inwood Forrest Assocs.*, 484 U.S. 365, 372, 108 S. Ct. 626, 639, 98 L. Ed. 2d 740 (1987) (dictum). Therefore, the term "collateral" as used in *Timbers* means the property which serves as security for the creditor's loan.

Arnette, 156 B.R. at 367. While NLI submits that a proper analysis of 11 U.S.C. § 506(a) renders NLI's claim against the DeNofas oversecured, NLI also contends that the

controlling Bankruptcy Code section on this issue is 11 U.S.C. § 506(b). NLI asserts that 11 U.S.C. § 506 (b) "clearly does *not* limit the analysis to the property in which the estate 'has an interest' but includes *all* property securing a loan." (NLI's Brief, at 29.) As noted above, 11 U.S.C. § 506(b) provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. § 506(b). NLI argues that Congress clearly and unambiguously limited the analysis under 11 U.S.C. § 506(a) to property in which the bankruptcy estate has an interest, but broadened the analysis under 11 U.S.C. § 506(b) to property which secures the loan without regard to whether the bankruptcy estate has an interest in such property. Thus, NLI asserts, the plain and fair reading of 11 U.S.C. § 506(b) is that all property which secures a loan, regardless of whether the debtor has an interest in such property, should be examined in determining whether interest runs post-petition.

The DeNofas assert, however, that for purposes of determining whether NLI's claim against the DeNofas was oversecured, the Bankruptcy Court was required to include only the DeNofa property in calculating the value of collateral. The DeNofas contend that the property to which

11 U.S.C. § 506(b) refers can only be "property of the estate" as specifically set forth in 11 U.S.C. § 506(a). The proper analysis of this issue, the DeNofas assert, begins with the *claim*, which is the debt on the bankruptcy petition filing date. Thus, NLI's claim against the DeNofas was what-the DeNofas owed NLI's predecessor "at the date of the filing of the petition." 11 U.S.C. § 502(b). Then, the claim, if allowed, is fixed at that amount. That the debt may keep increasing as to others outside the bankruptcy is not relevant to the claim against the debtor in the bankruptcy case. Title 11 U.S.C. § 506(b) provides that if the "allowed secured *claim* is secured by property the value of which ... is greater than the amount of such *claim*," the holder of the *claim* is allowed interest, reasonable costs and charges as provided for under the agreement upon which such *claim* arose to the extent of oversecurity. Thus, the DeNofas contend, the property referred to in 11 U.S.C. § 506(b) can only be the "property of the estate" as set forth in 11 U.S.C. § 506(a). The DeNofas assert that in this case, the property securing the NLI's claim against the DeNofas has always been the DeNofas' home as that is the only property in which both the creditor and the debtor's estate have an interest.

In further support of their position, the DeNofas rely on *In Re Stephen Shields Pardue*, 143 B.R. 434 (Bankr. D. Tex. 1992), which this Court finds is more on point than *Ladycliff*, but still not binding on this Court. In *Pardue*, the debtor incurred consumer debt by executing a simple interest note secured by 100 shares of stock owned by the debtor's father. Soon after the debtor sought relief under Chapter 13, the creditor bank filed a proof of claim in the amount of $3,138.33. The creditor bank also asked that the court

determine that it was entitled to attorney's fees and interest, claiming that the stock securing the loan to the debtor was valued at $10,000.00 and, therefore, the bank was an oversecured creditor. The court held, however, that as between the bank and the debtor, the bank was not secure at all because the collateral was not part of the bankruptcy estate but rather the property of the co-debtor, i.e., the debtor's father, who was not involved in the bankruptcy proceedings. *Pardue*, 143 B.R. at 438.

The DeNofas further assert that the Supreme Court case, *Timbers*, 484 U.S. 365, supports a finding that the collateral for determining NLI's secured status as to its claim against the DeNofas may only include the DeNofas' property. The *Timbers* Court held that, under the Bankruptcy Code, creditors are entitled to interest and costs only to the extent that, when added to the principal amount of the claim, the total would not exceed the value of the collateral securing the claim. If Judge Steckroth's ruling below, allowing NLI to add all of the interest accumulated since 1989 to its claim against the DeNofas, is correct, the DeNofas assert they would be losing the very protections that the Bankruptcy Code intended to provide because they would be required to pay interest far above and beyond the value of their home, which is their only collateral securing the DAK loan.

Finally, the DeNofas contend, if the Bankruptcy Court decision is allowed to stand, every guarantor would have no protection in bankruptcy because the claims against its bankruptcy estate would be measured by the amount of the debt owed by the non-bankrupt principal obligor. The DeNofas assert that Judge Steckroth's holding would only

have merit if the DAK, Katz and DeNofa cases had been substantively consolidated in the Bankruptcy Court, whereupon the assets and liabilities of each would be treated together.

Upon review of the Bankruptcy Court's October 16, 2002 Opinion, the cases cited therein, and the arguments propounded by NLI and the DeNofas, this Court finds that the Bankruptcy Court erred in including the DAK and Katz properties in the valuation of collateral for purposes of determining NLI's secured status with regard to NLI's claim against the DeNofas. In its commentary on "Determination of Oversecured Status of Claim," *Collier on Bankruptcy* provides that for purposes of 11 U.S.C. § 506(b), an "allowed secured claim" is an allowed claim that qualifies as a secured claim as provided under 11 U.S.C. § 506(a). The amount of a creditor's claim is typically determined as of the petition date, and includes the principal amount of the obligation plus all matured pre-petition interest, fees, costs and charges as of the petition date. For purposes of 11 U.S.C. § 506(b), a secured claim is oversecured to the extent that the value of the creditor's interest in the estate's interest in property is greater than the amount of the creditor's allowed pre-petition claim. *Collier on Bankruptcy*, ¶ 506.04[1] (citing *Baybank-Middlesex v. Ralar Distributors, Inc.*, 69 F.3d 1200, 1202 (1st Cir. 1995). Accord, *In re Toy King Distributors, Inc.*, 256 B.R. 1, 187 (M.D. Fla. 2000) ("Although the collateral subject to [the creditor's] loan includes property of the individual guarantor and property of the debtor, only the debtor's property is relevant to the court's determination of the secured status of Liberty's claim against the debtor under Section 506.") It is clear that the DeNofas' reading of

11 U.S.C. § 506 (a) in conjunction with § 506 (b) is correct to the extent that the collateral to be considered in determining whether a creditor is oversecured is that property in which the debtor against whom the creditor's claim is filed has an interest. The DeNofas have no interest in either the DAK property or the Katz property. Accordingly, there is no basis under 11 U.S.C. § 506 (b) for aggregating the property for the determination of NLI's secured status in a claim only against the DeNofas.

III. ***Whether the Bankruptcy Court Erred in not Crediting the Katz Payment***

The DeNofas assert that the Bankruptcy Court erred by not reducing NLI's claim against the DeNofas by the Katzes' settlement payment to NLI of $250,000.00. Judge Steckroth held that the DeNofas' argument that the payment should be applied to reduce the principal indebtedness owed by the DeNofas is neither required by the loan documents nor generally accepted corporate practice. Upon review of the loan documents, the arguments propounded by the parties, and the cases in support thereof, it appears that the parties' only disagreement on how to credit the Katzes' payment revolves around the issue of whether interest accrued on NLI's claim.

Section 9(F) of the Loan and Security Agreement provides:

> Any proceeds of any disposition by Lender of any of the Collateral may be applied by Lender to the payment of expenses in connection with the taking

> possession of, storing, preparing for sale, and disposition of Collateral, including Attorneys' Fees and legal expenses, and any balance of such Proceeds may be applied by Lender toward the payment of such of the Liabilities, and in such order of application, as Lender may from time to time elect.

(NLI's Exh. 2 at ¶ 9(f).) The "Liabilities" to which the provision refers specifically include interest. (*Id.* at ¶ 1(k).) Furthermore, the Guaranties on the loan signed by both Michael DeNofa and Steven Katz contain the following covenant:

> Any amount received by the Bank from whatsoever source on account of the Liabilities may be applied by it toward the payment of such of the Liabilities, and in such order of application, as the Bank may from time to time elect; and, notwithstanding any payments made by or for the account of the undersigned pursuant to this guaranty, the undersigned shall not be subrogated to any rights of the Bank until such time as this guaranty shall have been discontinued as to all of the undersigned and the Bank shall have received payment of the full amount of all Liabilities and of all obligations of the undersigned hereunder.

(NLI's Exh. 3.) Based on the Loan and Security Agreement and the Guaranties, the Court finds that Judge Steckroth's factual determination that the loan documents do not require NLI to apply the Katzes' payment to NLI's claim against the DeNofas is not clearly erroneous; therefore, that finding must be upheld.

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The DeNofas do not contest that the loan documents would allow a creditor to apply proceeds from disposition of collateral to interest, fees and other expenses. Indeed, the case relied on by the DeNofas, *In re Indian Palms Assoc., Ltd.*, 61 F.3d 197, 211 (3d Cir. 1995), in which the Third Circuit held that *unless interest accrues on a debt during bankruptcy*, post-petition payments should be allocated to reduction of the principal debt, indicates that their position is not contrary to that asserted by NLI. Rather, the disagreement between the parties is factual, not legal. The DeNofas assert that no interest accrued on NLI's claim; therefore, under the circumstances of the case at bar, the Katzes' payment must be applied to the principal debt. NLI maintains that interest has accrued on the claim because the claim was oversecured; therefore, the Katzes' payment should be applied to reduce the interest, not the principal debt.

As determining whether NLI is an oversecured creditor is crucial to the proper application of the Katzes' payment, the Court finds that Judge Stecktroth prematurely concluded, under the circumstances of the case at bar, that the payment should not be applied to the principal debt. Although the Bankruptcy Court held that NLI was an oversecured creditor entitled to postpetition interest under 11 U.S.C. § 506(b), at the time it entered an order finding that the DeNofas were not entitled to a credit on NLI's claim for the Katzes' payment, the Bankruptcy Court had yet to determine whether the parties reached an agreement to freeze the accruing of interest. If the Bankruptcy Court were to find that there was an agreement to freeze interest, the Katzes' payment would have to have been applied, at least in part, to the principal debt, barring any overriding fees or expenses other than interest.

Accordingly, the Court finds that the Bankruptcy Court erred in determining that the Katzes' payment should not be applied to the principal debt, prior to resolving whether there was an agreement to freeze interest. Therefore, this Court reverses the holding of the Bankruptcy Court on that issue.

Moreover, this Court has determined that NLI was an undersecured creditor at the time the DeNofas filed their Chapter 11 petition and NLI is not entitled to post-petition interest under 11 U.S.C. § 506(b). Accordingly, if, on remand the Bankruptcy Court determines there are no other costs or fees owed by the DeNofas, the Katzes' payment should be applied to the principal debt.

CONCLUSION

For the foregoing reasons, this Court reverses the Bankruptcy Court's October 16, 2002 Order that NLI's claim against the DeNofas was oversecured and that the DeNofas were not entitled to a credit against the principal of the allowed claim of NLI for the $250,000.00 payment made by the Katzes; and it remands this matter to the Bankruptcy Court for further proceedings consistent with this Opinion and Order.

/s/ John W. Bissell
JOHN W. BISSELL
Chief Judge
United States District Court

DATED: January 27, 2004

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JANUARY 27, 2004

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 02-5529
(Bankruptcy Case: 89-4790(DHS)

In re:

MICHAEL E. DeNOFA and
TOMMYE DeNOFA, his wife,

Debtors.

MICHAEL E. DeNOFA and
TOMMYE DeNOFA, his wife,

Appellants,

v.

NATIONAL LOAN INVESTORS, L.P.,

Appellee.

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It is, on this 27th day of January, 2004,

ORDERED that the Bankruptcy Court's Order of October 16, 2002 be, and it hereby is reversed, and this matter is hereby remanded to the U.S. Bankruptcy Court for further proceedings consistent with this Opinion and Order.

/s/ John W. Bissell
JOHN W. BISSELL
Chief Judge
United States District Court

APPENDIX F — OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY FILED OCTOBER 16, 2002

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Case No. 89-94790

Chapter 11

Adv. Pro. No. 97-2304

In Re:

Michael E. DeNofa and Tommye DeNofa,

Debtors.

Michael E. DeNofa and Tommye DeNofa, his wife,

Plaintiffs,

v.

National Loan Investors and Federal Deposit Insurance Corporation

Defendants.

Appendix F

OPINION

HONORABLE DONALD H. STECKROTH, BANKRUPTCY JUDGE

This matter is before the court upon a motion by the Chapter 11 debtors, Michael E. and Tommye DeNofa (the "debtors" or the "DeNofas"), seeking partial summary judgment in their adversary proceeding against National Loan Investors, L.P. ("NLI"). The DeNofas seek relief concerning the nature, extent and amount of NLI's claim. NLI has opposed the motion and cross-moved for summary judgment. The Federal Deposit Insurance Corporation ("FDIC") is a named defendant. The FDIC submitted a short letter opposing Debtors' motion for partial summary judgment and in support of NLPs cross-motion for summary judgment. In addition, the FDIC requested dismissal of *the* second count of the adversary complaint insofar as it sought relief against the FDIC.

The court has jurisdiction to consider this application under 28 U.S.C. §§ 1334(b), 151 and 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K) concerning the validity and extent of liens. Venue is proper under 28 U.S.C. §§ 1408 and 1409.

I. FINDINGS OF FACT

The history of this case begins in October 1983 when a loan was made to DAK Manufacturing Corporation ("DAK"), a corporation formed by debtor Michael DeNofa and his former business partner Steven Katz ("Katz"), by NLI's

predecessor in interest, Continental Illinois National Bank and Trust Company of Chicago ("Continental"). Pursuant to this loan transaction, approximately one million dollars was borrowed from the bank by DAK for the purpose of allowing DeNofa and Katz to acquire a new business from REL Manufacturing Corporation. DAK operated a plastics business from its address at 475-485 Boulevard, Elmwood Park, New Jersey. Opinion at 2.[1]

Pursuant to the Loan and Security Agreement dated October 28, 1983 ("the Agreement"), Continental agreed to lend DAK certain sums not to exceed $1,000,000. The Agreement provided that interest would be charged on the outstanding balance of the loan, that DAK's failure to repay the liabilities per the Agreement would constitute a default under the Agreement, and that DAK would be liable for the lender's costs, including attorneys' fees and expenses in the event of default. The Continental loan was secured by DAK's accounts, equipment and other property, and by DAK's interest in real property at 475-485 Boulevard, Elmwood Park, New Jersey.

Messrs. DeNofa and Katz were the officers and equal 50% shareholders of DAK prior to October 1983. In connection with the issuance of the loan from Continental to DAK, Mr. DeNofa executed an unconditional personal

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1. The opinion of Judge William Tuohey dated December 10, 1998 in this proceeding shall be designated as "Opinion at __" The Opinion is attached as Exhibit "E" to Debtors' Third Amended Disclosure Statement.

guarantee to Continental for all liabilities owed to Continental under the Agreement ("the Guarantee").[2]

As security for the Guarantee and the obligations of DAK under the Agreement, the DeNofas each executed a mortgage ("Mortgage") in favor of Continental on their residence commonly known as 770 Scott Drive, River Vale, New Jersey (the "Mortgaged Property"). Referring specifically to the DAK Agreement and the Guarantee, the Mortgage provided:

> the intent and purpose of this Mortgage is to secure (i) all the obligations of Mortgagors pursuant to the aforementioned Guarantee, (ii) the obligations of DAK under the aforementioned Agreement and (iii) all replacements, renewals, modifications, amendments, extensions or increases of the Guarantee and Agreement . . . .

Mr. Katz also executed a similar unconditional personal guarantee to Continental and he and his wife each executed and delivered to Continental a mortgage on their residence commonly known as 5 Cardinal Court, Montvale, New Jersey.

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2. Mr. DeNofa's guarantee provided:

> [T]he undersigned hereby unconditionally guarantee(s) . . . the full and prompt payment when due, whether by acceleration or otherwise, and at all times thereafter, of all obligations of the Debtor to the Bank, howsoever created, arising or evidenced, whether direct or indirect, absolute or contingent or now or thereafter existing, or due or to become due . . . .

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On November 7, 1985, DAK filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. DAK scheduled a secured debt to Continental in the amount of $740,788.

In June of 1987, the DAK loan package was conveyed to the FDIC. Pursuant to this arrangement, the FDIC assumed all of the rights and obligations of Continental under the loan documents relevant herein. The FDIC thereafter actively participated as the successor in interest to Continental in the DAK, DeNofa and Katz bankruptcy proceedings.

On August 17, 1988, a foreclosure proceeding was filed against the DeNofas in the New Jersey Superior Court, Chancery Division in Bergen County. In this action, Continental sought to foreclose on the Mortgaged Property. Prior to the entry of judgment in the foreclosure action, the DeNofas filed the within chapter 11 proceeding on June 20, 1989. In Schedule B of the bankruptcy schedules, the debtors valued the Mortgaged Property at $300,000. The debtors also listed a first mortgage, superior to the Mortgage held by the FDIC, with an outstanding balance of $25,000.

On or about August 18, 1989, Continental filed a proof of claim in the DeNofa bankruptcy in the amount of $866,266.88. On July 10, 1998, NLI filed an amended proof of claim in the amount of $1,064,770.33. The amended proof of claim sought interest due after the DeNofa bankruptcy filing and established the amount of the claim as of June 30, 1998.

Appendix F

In December 1989, the Katzes filed a chapter 11 proceeding with this court under case number 89-20271. Pursuant to an "Assignment of Mortgage" dated December 16, 1996, the FDIC assigned the mortgages, guarantees and loan to NLI. In July 1999, after the conclusion of a trial held by Judge Tuohey, Katz and NLI entered into a settlement agreement which resolved NLI's foreclosure action against Katz by way of a Final Consent Judgment of Foreclosure pursuant to a Stipulation of Settlement between the parties. The settlement provided for NLI's acceptance of $250,000 as a discounted settlement amount in satisfaction of the indebtedness provided that the payment was received before September 8, 1999. Katz did pay the $250,000 prior to September 8, 1999. NU applied the $250,000 payment to the interest accrued on the October 28, 1983 loan to DAK as guaranteed by Katz and DeNofa.

A. ***Litigation Before Bankruptcy Judge Tuohey***

The lengthy litigation in the DeNofa bankruptcy originated before Bankruptcy Judge William Tuohey in July 1990 when the FDIC filed a motion for relief from the automatic stay in order to proceed with the foreclosure action. Judge Tuohey denied the motion but ordered the debtors to make monthly "adequate protection" payments to the FDIC.

After the mortgage was assigned to NLI, another motion for relief from the stay was filed in March of 1997. NLI sought relief from the stay or, in the alternative, a dismissal of the reorganization proceeding. In response to NLI's motion, the debtors filed an adversary proceeding against NLI and the FDIC. The adversary proceeding sought from

NLI (1) an accounting as to the nature, extent and validity of NLI's claim, and (2) a reduction in the amount owed by the debtors on the Guarantee and Mortgage based on an alleged oral agreement made in January of 1991 with a representative of the FDIC.

On April 27, 1998, NLI moved for summary judgment in the adversary proceeding on the issue of the DeNofas alleged oral settlement agreement. In an order dated June 10, 1998, the Bankruptcy Court granted partial summary judgment "in favor of NLI on all of Plaintiffs' claims relating to an alleged settlement or modification of the subject loan documents. Plaintiffs claims seeking to compel NLI to accept payment in accordance with the alleged settlement/ modification, are hereby dismissed with prejudice." *See* Adversary Proceeding Docket No. 90.

Judge Tuohey ultimately conducted a trial of the adversary proceeding over a period of several days between July and October 1998. In his opinion dated December 10, 1998, he fixed the amount of the NLI liability secured by the DeNofa Mortgage at $161,807. From the $1,064,770.33 amended proof of claim, the Court deducted counsel fees that NLI agreed to waive in the amount of $97,799.91 and excluded interest that had accrued after the DeNofas filed for bankruptcy in June 1989, finding that at a January 1991 settlement meeting: "The FDIC and the individual loan guarantors all reached an agreement of cooperation in exchange for freezing of the loan interest rate." Opinion at 13. Based on the calculations in NLI's own amended proof of claim, that left $323,615.69 as the amount due on NLI's secured debt. Judge Tuohey noted that the loan was

co-guaranteed by Mr. and Mrs. Katz and thus fixed the debt secured by the Mortgage on the DeNofa property at $161,807 and determined that the same sum was secured by the Katz property.

Judge Tuohey's December 10, 1998 Opinion also increased the DeNofas' adequate protection payments from $500 to $1,500 per month on an interim basis pending confirmation of their Chapter 1 I Plan.

B. ***Appeal to the District Court***

On December 21, 1998, NLI filed a notice of appeal with the United States District Court of the Bankruptcy Court's December 10, 1998 Decision and Order in the Adversary Proceeding. The debtors likewise filed a notice of appeal with the District Court.

In support of the appeal, NLI (and FDIC) argued *inter alia*: (1) that the Bankruptcy Court improperly froze post-petition interest based on the alleged January 1991 oral agreement and settlement; and (2) that the Bankruptcy Court erred in bifurcating NLI's claims between the DeNofas and the Katzes, rather than enforcing Mr. DeNofa's guarantee for the full amount.[3]

In light of the Bankruptcy Court's earlier decision on the summary judgment motion when it was determined that

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3. NLI also argued other points in its appeal which are not relevant to the issues presented by the parties in the current motion and cross-motion.

no settlement agreement existed, the District Court determined NLI was prejudiced by the Bankruptcy Court's failure to warn that it was reconsidering whether the parties had agreed to a settlement or oral modification regarding the freezing of interest under the Agreement. In its original February 10, 1998 decision, the Bankruptcy Court stated on the record: "There were discussions. There were offers, but there was never a point in time where FDIC said, we'll take X and DeNofa agreed to pay X." The Bankruptcy Court added: "I'm finding initially there was no such agreement, but even if there was, the oral . . . agreement, in an attempt to modify the loan, would violate the Statute of Frauds." In its Opinion rendered December 1998, however, the Bankruptcy Court froze interest on the debt as of the date of the DeNofa bankruptcy filing because it "[found that at the conference in January 1991 held in Newark, New Jersey, the FDIC and the individual loan guarantors all reached an agreement of cooperation in exchange for freezing of the loan interest rate." Opinion at 13. The District Court found the Bankruptcy Court excluded all evidence at trial as to any agreements reached at the January 1991 conference, including Mr. Katz' testimony that the FDIC had promised to freeze interest on the debt. In light of these factors, the District Court determined that the Bankruptcy Court erred in subsequently determining, without notice to the parties, that interest should be frozen as of the DeNofa petition filing date because of an oral agreement reached at the January 1991 settlement conference. Bissell Opinion at 23.[4] Judge Bissell went on to state:

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4. The Opinion of Judge John W. Bissell, USDJ, dated April 12, 1999 shall be designated as "Bissell Opinion at __" It is attached as Exhibit "F" to Debtors' Third Amended Disclosure Statement.

Appendix F

> [T]he Court concludes, FDIC and NLI were prejudiced by the Bankruptcy Court's failure to warn them that it was reconsidering whether the parties had agreed to a settlement or modification of their loan agreement. NLI and FDIC have argued, at a minimum, they would have introduced additional evidence and engaged in more detailed examination on that subject if they had known that the Bankruptcy Court was still considering the existence and effect of any settlement agreements. NLI also contends that it might have asserted claims of its own against FDIC, if it had not believed the subject to be closed.

Bissell Opinion at 23-24. Because of this finding, the District Court reversed that portion of the Bankruptcy Court's December 1998 decision which found that interest should be frozen as of the DeNofa filing date. The District Court remanded "the matter to the Bankruptcy Court for further proceedings which, if the Bankruptcy Court so directs, could include a plenary trial with either a new or supplemented record on that issue, now that all parties have notice thereof." Bissell Opinion at 24. In an important footnote, Judge Bissell added:

> Before retrying the issue of whether the parties agreed to freeze interest rates at the January 1991 conference, the Bankruptcy Court may choose to examine, on the record already before it, *whether NLI and FDIC are entitled to post petition interest*

> *in any event as oversecured creditors under 11 U.S.C. § 506. If they are not. No retrial will be necessary.* [emphasis added].

Bissell Opinion at 24, fn. 2.

On the issue whether the Bankruptcy Court was correct in bifurcating NLI's claim between the DeNofas and the Katzes, the District Court reversed the Bankruptcy Court's decision. "Mr. DeNofa guaranteed the "full" payment of the debt .... Under the plain language of Mr. DeNofa's guarantee, it covered the full amount of DAK's debt. The full amount was therefore secured by the DeNofa's mortgage." Bissell Opinion at 36-37. The District Court therefore reversed that portion of the Bankruptcy Court's December 10, 1998 Decision that reduced the DeNofas' liability in light of the Katz guarantee. Bissell Opinion at 37.

The debtors raised several issues in their appeal of the Bankruptcy Court's rulings. Most importantly, for current purposes, the DeNofas' contended that the Bankruptcy Court erred in fixing the amount of the debt at $323,615.69, rather than holding the debt paid in full and ordering a refund of the DeNofas' adequate protection payments. Bissell Opinion at 42. NLI's Amended Proof of Claim was in the amount of $1,064,770.33. When the Bankruptcy Court fixed the debt at $323,615.69, it deducted from the claimed amount only counsel fees that had been waived and interest that NLI claimed had accrued after the DeNofa bankruptcy filing date. The DeNofas argued that the Bankruptcy Court erred in not reducing the amount further, deeming the debt paid in full,

and ordering a refund of adequate protection payments. Bissell Opinion at 43. In discounting all of the DeNofas' arguments in this regard, the District Court held that it would not reverse the Bankruptcy Court's determination that NLI and FDIC had adequately proved the debt of $323,615.69. Bissell Opinion at 48.

The Bissell Opinion was the subject of Debtors' motion for reconsideration which was denied by the District Court by an order entered December 16, 1999. The Debtors thereafter filed a notice of appeal of the Bissell Opinion and Order of April 12, 1999. The Third Circuit Court of Appeals dismissed the Debtors' appeal on November 21, 2000.

II. CONTENTIONS

The primary issue raised by both the motion and cross-motion involves a determination of the amount of NLI's claim. The debtors argue that NLI's claim should be set at $24,115.59. The debtors first point out that Judge Tuohey found that the loan balance as of June 30, 1998 was $323,615.69. Judge Bissell affirmed this finding on appeal subject only to a determination of whether interest accrued on the debt after the Chapter 11 petition was filed. The debtors argue that as of the petition date, the equity available in their home for the payment of the Mortgage held was $275,000. Thus, since the amended proof of claim far exceeded this sum, they argue Continental was an undersecured creditor by application of 11 U.S.C. § 506(a) and thus not entitled to post-petition interest under 11 U.S.C. § 506(b). From the $323,615.59, the DeNofas deduct (1) the $250,000 lump sum settlement paid by the Katzes in September 1999 and (2) the

adequate protection payments made by the DeNofas from June 30,1998, i.e., $49,500. These two deductions allow the DeNofas to arrive at $24,115.59, the figure they contend was owed at the time of Debtors' Motion.

NLI argues that the extent of its claim is $1,064,770.33 as of June 30, 1998, secured by a duly recorded Mortgage on the Mortgaged Property subject to a deficiency election under 11 U.S.C. § 1111(b).

NLI's cross-motion for partial summary judgment seeks dismissal of the complaint on the issue of the alleged oral settlement agreement that interest would not accrue and contends that the debtors' deposition, certification and trial testimony clearly reveal that the debtors can offer no evidence as to the existence of an oral modification of the loan documents. Thus, NLI argues, the debtors are unable to present any specific material facts which refute NLI's prima facie entitlement to summary judgment on the issue of the alleged oral modification agreement. The remaining issue of concern to NLI in its cross-motion is the amount of NLI's claim and it is asserted there are no issues of disputed fact.

In the second count of the complaint, debtors allege they are entitled to $75,000 from the FDIC as compensation under § 506(c) of the Bankruptcy Code for the alleged assistance of Mr. DeNofa in connection with the DAK bankruptcy matter. The FDIC seeks dismissal of that claim asserting that only a trustee may recover pursuant to § 506(c) against the secured party. Since the claim asserted by Mr. Nofa against the FDIC was not brought by a trustee, the FDIC asserts Debtors have failed to state a claim under § 506(c) and that the claim should be dismissed.

Appendix F

III. CONCLUSIONS OF LAW

A. *Summary Judgment Standard*

Summary judgment is justified if the moving party can "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law," Fed.R.Civ.P. 56(c). When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the non-movant. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The court must accept the non-movant's version of the facts as true, and resolve conflicts in the non-movant's favor. *Big Apple BMW. Inc. v. BMW of North America. Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). However, by its very terms, Rule 56(c) provides that the mere existence of *some* alleged factual disputes will not defeat a properly supported motion for summary judgment. Only disputes over facts which might affect the outcome of the suit will preclude entry of summary judgment. Partial disputes that are irrelevant or unnecessary are not counted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986).

The initial burden of demonstrating the absence of genuine issues of material fact falls on the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Once the movant has done so, the burden shifts to the non-movant. The non-movant "cannot merely rely upon conclusory allegations

in his pleadings or in memoranda and briefs to establish a genuine issue of material fact." *Harter v. GAF Corn.*, 967 F.2d 846, 852 (3d Cir. 1992). Instead, he "must make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by the depositions and admissions on file." *Id.* Rule 56(e) does not allow a party resisting a summary judgment motion to rely merely upon "bare assertions, conclusory allegations or suspicions." *Reitmeir v. Kalinoski*, 631 F.Supp. 565, 567 (D.N.J. 1986) (citing *Jersey Central Power & Light Co. v. Lacey Township*, 772 F.2d 1103 (3rd Cir. 1985)).

B. ***Amount of NLI's Claim under 11 U.S.C. & 506***

11 U.S.C. § 506(b) states:

> To the extent that an allowed claim is secured by property, the value of which is greater than the amount of such claim, there must be allowed to the holder of such claim, interest upon the claim, and any reasonable fees, costs or charges provided for under the agreement pursuant to which the claim arose.

The holder of an oversecured claim can recover, in addition to the full pre-petition amount of the claim, interest on such claim and any reasonable fees, costs, or charges provided for under the subject agreement. 11 U.S.C. § 506(b); *United States v. Ron Pair Enterprises. Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d. 290 (1989). Post petition interest continues to accrue on oversecured claims until payment of the claims or until the effective date of a

confirmed plan. *Rake v. Wade*, 508 U.S. 464, 466, 113 S. Ct. 2187, 2190, 124 L.Ed.2d 424 (1993).

The appropriate date for fixing valuation of collateral to determine secured status is the date on which the bankruptcy petition was filed and the case was commenced. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988); *In re Whalley,* 202 B.R. 58 (Bankr. W.D. Pa. 1996).

In this instance, the debtors argue that, since the fair market value of the DeNofa residence was substantially less than the amount due NLI on the petition filing date, NLI's claim was undersecured and interest did not accrue post petition and cannot be allowed under section 506(b). NLI, on the other hand, argues that under sections 506(a) and (b) it is the value of all collateral which secures a loan which is to be considered when determining whether a claim is oversecured.

In *In Re Lad; cuff College*, 56 B.R. 765 (S.D.N.Y. 1995), the court addressed the issue of whether collateral should be aggregated in determining value under section 506. The court stated:

> Section 506(b) states in part '[t]o the extent that an allowed secured claim is secured by *property* the value of which . . . is greater than the amount of such claim . . .' 11 U.S.C. § 506(b). The real question therefore is the 'property' which must be valued. (emphasis added)

The court thereupon concluded that aggregation of all collateral securing the loan was the proper method of determining whether the secured party was oversecured.

This court concludes that it is not simply the value of the DeNofas' residence which is controlling in the instant matter, as debtors allege without support, but rather the aggregate value of all collateral which secured the loan at the time of the DeNofas' petition. Thus, the relevant collateral included the pledged property of DAK, the Katzes and DeNofas. It is the total of this collateral which must be valued. *See In re Arnette*, 156 B.R. 366, 367 (Bankr. D. Conn. 1993) (where the court stated "[T]he term 'collateral; as used in *Timbers,* means the property which serves as security for the creditor's loan.").

At the time of the DeNofa bankruptcy petition, the value of the property securing the NLI loan, and thus the value for § 506(b) analysis, was as follows:

1. Equity in DeNofa home as scheduled by debtors = $275,000 ($300,000 FMV - $25,000 first mortgage)

2. Equity in Katz Real Property = $296,000

3. Value of interest in DAK property = $455,817

Total = $1,026,817

Thus, the NLI debt ($323,615.69 as determined by the Bankruptcy Court and affirmed by the District Court) was clearly oversecured on the date of the DeNofa petition and NLI is entitled as an oversecured creditor to interest accruing after that date as a matter of law. *See* 11 U.S.C. § 506(b). This, of course, is provided the parties had not reached an agreement and settlement providing for the freezing of interest.

The debtors argue further that the NLI claim must be reduced by $250,000, the amount paid by Katz in settlement. This argument has been determined and rejected by the District Court. *See* Bissell Opinion at 37. This court agrees. The loan documents are clear and unambiguous and allow NLI to apply payments in its discretion, including first to interest and fees before reducing principal. The DeNofas' argument that the $250,000 payment by Katz is to be applied to reduce the principal indebtedness owed by DeNofa is not required by the loan documents nor generally accepted corporate practice. *See FDIC v. Atchison & Keller*, 913 F.Supp. 19 (D.D.C. 1996) (where the court held that a guarantor had no right to direct that payments be applied in descending order to outstanding principal, then interest, then costs and fees owed).

While the court has primarily disagreed with the debtors' positions regarding the amount of NLI's allowed claim, I do find that NLI's claim should be reduced by the adequate protection payments debtors made from June 1998 to date. Thus, at the time of the motion, the sum of $49,500 had been paid which would reduce the debt due to NLI to $1,015,270.33, assuming interest runs post petition. *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 201 (3rd Cir.

1995); *In re Rack Engineering Co.*, 212 B.R. 98, 104-105 (Bankr. W.D. Pa. 1997). This sum is to be further reduced by the $1,500 monthly payments made by the debtors.

It is unclear as to whether DeNofa seeks § 506(c) compensation from NLI or the FDIC since the Second Count of plaintiffs complaint seems to allege a claim against both parties. In any event, the United States Supreme Court has held that only a trustee has a right to invoke 11 U.S.C. § 506(c) and recover payment of an administrative claim. *Hartford Underwriters Ins. Co. v. Union Planters Bank N.A.*, 530 U.S. 1, 120 S.Ct. 1942, 147 L.Ed.2nd 1 (2000). Here, since it was the DAK Chapter 11 and not the DeNofa Chapter 11 in which DeNofa estimates he spent 900 hours assisting DAK's counsel for the benefit of the FDIC, DeNofa is not a proper claimant allowed to recover under § 506(c) of the Code. Thus, Count Two of the adversary proceeding is hereby dismissed against the FDIC and NLI.

Finally, with respect to NLI's motion for summary judgment on the alleged oral agreement, the issue is simply not ripe for summary judgment. Questions of fact exist and, as pointed out by the district court, NLI was not given fair notice that the issue was being reconsidered by the court and thus a trial on that issue must be conducted. See Bissell Opinion at 23-24.

Appendix F

IV. CONCLUSION

For the above reasons, an order shall be entered in accordance with this opinion holding that NLI's allowed claim of $323,615.69 is oversecured pursuant to the provisions of 11 U.S.C. § 506(b), denying debtors' credit for the Katz $250,000 payment, and authorizing credit for adequate protections payments made by debtors. Count Two of the Complaint is dismissed as to NLI and FDIC. A conference shall be held by the Court on Thursday, October 31, 2002, at 10:00 a.m., with the parties, for the purpose of scheduling limited discovery, if necessary, and a trial on the issue of whether the parties agreed to freeze the running of interest.

APPENDIX G — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY DATED OCTOBER 16, 2002

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Case No.: 89-94790

Hearing Date:

Adv. No.: 97-2304

Judge: Donald H. Steckroth

In Re:

Michael E. DeNofa and Tommye DeNofa,

Debtors.

Michael E. DeNofa and Tommye DeNofa, his wife,

Plaintiffs,

v.

National Loan Investors and
Federal Deposit Insurance Corporation,

Defendants.

Appendix G

ORDER

The relief set forth on the following page, numbered two (2), is hereby **ORDERED**.

s/ Donald H. Steckroth
DONALD H. STECKROTH
UNITED STATES BANKRUPTCY JUDGE

Dated: October 16, 2002

This matter having been opened to the court upon the motion by debtors seeking partial summary judgment and the cross-motion of defendant National Loan Investors ("NLI"), and the court having heard and considered the arguments of counsel, and for the reasons set forth in the court's Opinion dated October 16, 2002, and good cause shown,

It is, on this 16th day of October, 2002,

ORDERED that the allowed claim of NLI in the sum of $323,615.69 was oversecured on the date of debtors' petition pursuant to 11 U.S.C. § 506(b); and it is further

ORDERED that debtors are not entitled to a credit against the allowed claim of NLT for the $250,000 payment made by Steven Katz; and it is further

ORDERED that debtors are entitled to a credit against the allowed claim of NLI for the adequate protection payments made; and it is further

Appendix G

ORDERED that Count Two of the Complaint is dismissed; and it is further

ORDERED that the balance of NLI's motion for partial summary judgment is denied without prejudice pending further hearing and order of the court; and it is further

ORDERED the parties shall appear before the court on October 31, 2002, at 10:00 a.m., for the purpose of scheduling limited discovery, if necessary, and a trial on the issue of whether the parties agreed to freeze interest on the allowed claim at the January 1991 conference.

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 16, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-1686

IN RE:
MICHAEL E. DENOFA
TOMMYE DENOFA,

Debtors

MICHAEL E. DENOFA;
TOMMYE DENOFA

v.

NATIONAL LOAN INVESTORS, L.P.,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 02-cv-05524)
District Judge: Honorable John W. Bissell

Present: SCIRICA, *Chief Judge,* RENDELL and FISHER,
Circuit Judges.

Appendix H

SUR PETITION FOR PANEL REHEARING

The petition for panel rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and a majority of the judges who concurred in the decision not having asked for rehearing, it is hereby ORDERED that the petition for panel rehearing is hereby DENIED.

BY THE COURT:
/s/ D. Michael Fisher
Circuit Judge

Dated: March 16, 2005
DMM/cc: Daniel M. Eliades, Esq.
Michael S. Kopelman, Esq.

No. 04-1568

In The
Supreme Court of the United States

NATIONAL LOAN INVESTORS, L.P.,

Petitioner,

v.

MICHAEL E. and TOMMYE DENOFA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY PETITIONER

The questions posed by the Petitioner in this matter are as stated by the Petitioner in its Petition for A Writ of Certiorari.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

The Respondents, Michael E. and Tommye DeNofa (the "Respondents" or "DeNofas") respectfully urge this Court to deny the Petitioner's request for an issuance of a writ of certiorari to review a decision and order of the United States Court of Appeals for the Third Circuit entered February 17, 2005 which affirmed the United States District Court for the District of New Jersey's finding of January 27, 2004, that only property securing the loan which belonged to the bankruptcy estate – and not third-party property securing the loan – could be included in a calculation of the value of secured property for purposes of assessing a claim for post-petition interest under 11 U.S.C. § 506(b).

OPINIONS BELOW

The Opinions of the Courts Below are as outlined in the Petitioner's *Opinions Below*.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is as stated by the Petitioner in its *Petition for A Writ of Certiorari*.

STATUTORY PROVISIONS INVOLVED

The statutory provision involved in this matter is as stated by the Petitioner in its *Petition for A Writ of Certiorari*. In addition thereto, 11 U.S.C. § 506(a) and 11 U.S.C. § 541(a)(1), are involved in this matter, indicated respectively below:

§ 506. Determination of secured status;

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

§ 541. Property of the estate;

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

STATEMENT OF THE CASE

A. Factual Background

In the interest of judicial economical and brevity, the Respondents shall rely upon the procedural history and facts set forth in Opinion of the United States District Court for the District of New Jersey dated January 27, 2004, see Appendix D, pages 11a to 45a, and the Opinion of the United States Court of Appeals for the Third Circuit filed February 17, 2005, see Appendix A, pages 1a to 6a.

Generally, however, the Respondents accepts as the salient facts the *Statement of the Case; A. Factual Background*, as outlined by the Petitioner, with the exception to various non-factual statements such as this case involves "statutory interpretation under Title 11 . . . which arises frequently in Bankruptcy Courts, and which has been subject to varying holdings;" that "uniformity of application [of 11 U.S.C. § 506(b) is] currently lacking"; and that there is "a substantial question which split the courts below in their rulings". See Petition, pages 3 and 5. The Respondents contend that there is no such "substantial question" or "lack of uniformity" in the application of 11 U.S.C. § 506(b) and the Petitioner has failed to cite cases to support its contentions.

Further, with respect to that portion of the Petitioner's statement of facts, see Petition, page 4, regarding the Bankruptcy Court's holding with respect to the "value of all property securing the NLI allowed secured claim exceeded the value of such claim . . . ", because the District Court excluded the DAK and Katz property in reaching its conclusion that the Petitioner was undersecured, it was unnecessary for it to consider whether or not the Bankruptcy Court's finding as to value amounts was "clearly

erroneous". The Respondents contended below that it was and, to the extent necessary, do so here. The Katz and DAK properties were not valued as of the filing date. The Bankruptcy Court had no citations to the record on where its numbers came from.

B. Statement of Federal Jurisdiction

The Statement of Federal Jurisdiction is as outlined in the Petitioner's *Statement of the Case; B. Statement of Federal Jurisdiction.*

LEGAL ARGUMENT: REASONS FOR DENYING THE PETITION

I. The Petitioner has failed to put forth a compelling reason as to why a writ of certiorari should be granted

The Petitioner requests this Court to issue a writ of certiorari on the basis that the holdings of the District Court and the subsequent holding of Third Circuit affirming the District Court's decision are "inconsistent with the precise language" of 11 U.S.C. § 506(b). See Petition, page 5. The Petitioner characterizes its request for review as a "substantial question which split the courts below in their rulings". See Petition, page 5.

While the utilization of the buzz word "substantial" strives to make the "question" sound significant, in reality, it is nothing of the sort. Rather, the Petitioner is simply seeking another bite at the apple.

The Petitioner has failed to state a single compelling reason for this Court to issue a Writ of Certiorari as

required by Sup. Ct. R. 10. Of those applicable sections of Sup. Ct. R. 10, (a) and (c), the Petitioner has not indicated that the Third Circuit has "entered a decision in conflict with a decision of another United States Court of Appeals" or "has so far departed from the accepted and usual course of judicial proceedings". *Id.* Nor has the Petitioner indicated that the Third Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.*

The Petitioner has only indicated that its Petition involves "a question of statutory interpretation [of 11 U.S.C. § 506(b)] which arises frequently in Bankruptcy Courts, and which has been subject to varying holdings". See Petition, page 3. Further, the Petitioner states that uniformity of application of this statute is "currently lacking". See Petition, page 3. However, nowhere in the Petition does the Petitioner actually give an example of "varying holdings" or "currently lacking" uniformity among the United States Court of Appeals.

The Petitioner only cites a lower court case of *In re Arnette*, 156 B.R. 266, 267 (Bankr. D. Conn. 1993), stating that the Bankruptcy Court "cited to the decision . . . to support its decision [that collateral should be aggregated in determining value under section 506]". See Petition, page 4. Thereafter, the Petitioner states that the District Court "disregarded the Bankruptcy Court's reliance on *Arnette* and cited to the decision in *In re Stephen Shields Pardue*, 143 B.R. 434 (Bankr. D. Tex. 1992) in support of its holding". See Petition, page 4.

With the Petitioner's citation of two (2) lower court cases, *Arnette* and *Pardue*, where is the lack of uniformity among the **United States Court of Appeals**? (emphasis added).

It should be noted that in coming to its incorrect conclusion that all collateral which secured a loan should be aggregated in determining value under section 506, the Bankruptcy Court only briefly mentioned *Arnette* in its decision, as follows:

> This court concludes that it is not simply the value of the DeNofas' residence which is controlling in the instant matter, as debtors allege without support, but rather the aggregate value of all collateral which secured the loan at the time of the DeNofas' petition. Thus, the relevant collateral included the pledged property of DAK, the Katzes and DeNofas. It is the total of this collateral which must be valued. ***See In re Arnette*, 156 B.R. 366, 367 (Bankr. D. Conn. 1993) (where the court stated "[T]he term 'collateral; as used in *Timbers*, means the property which serves as security for the creditor's loan.").**

See Appendix F, page 64a. (emphasis added).

In comparison, and which the Petitioner neglects to mention, is the Bankruptcy Court's heavy reliance for its incorrect conclusion upon *In Re Ladycliff College*, 56 B.R. 765 (S.D.N.Y. 1995). It appears the Petitioner wants to ignore the Bankruptcy Court's reliance upon *Ladycliff* as it would show how *off base* the Bankruptcy Court was in coming to its incorrect conclusion and as pointed out by the District Court, to wit:

> The Bankruptcy Court held that the aggregation of all the collateral securing the loan was the proper method of determining whether the secured party was oversecured under 11 U.S.C. § 506(b). [The Bankruptcy Court] relied primarily on [*Ladycliff, supra*] . . . The *Ladycliff* court concluded that aggregation of all collateral securing the loan was the proper method of determining whether the secured party was oversecured. **However, this Court finds that not only is *Ladycliff* not binding on this Court, but also, it is not even persuasive because it addresses only circumstances involving one debtor** and an unusual set of facts requiring the interpretation of the language of a mortgage.

See Appendix D, page 36a (emphasis added).

Additionally, as to the Petitioner's statement that the District Court "disregarded the Bankruptcy Court's reliance on *Arnette* and cited to the decision in [*Pardue, supra*] in support of its holding", while the District Court did cite this case, it also stated that it found *Pardue* " . . . more on point than *Ladycliff*, but still not binding on this Court". See Appendix D, page 39a. The District Court did not place all its decisional eggs in one case basket. Rather, the District Court gave a firm foundation for its decision that the Bankruptcy Court erred in including the DAK and Katz properties in the valuation of collateral for purposes of determining the Petitioner's secured status with regard to the Petitioner's claim against the DeNofas, by citing *Collier on Bankruptcy* ¶ 506.04[1] (citing *Baybank Middlesex v. Ralar Distributors, Inc.*, 69 F.3d 1200, 1202 (1st Cir. 1995). See Appendix D, page 41a.

Nonetheless, even with the Petitioner limiting the case references to *Arnette* and *Pardue*, these cases are

hardly examples of "varying holdings" or "currently lacking" uniformity, let alone an example of conflict with a decision of another United States Court of Appeals or with a decision of this Court as again required by Sup. Ct. R. 10 for this Court to issue a Writ of Certiorari.

As to the Petitioner's statement that there is a "split of the courts below", it begs the question of where? Again, there is no example given of a "split" amongst the United States Court of Appeals. The only possible "split" is contained within the sequence of decisions in this very case, *i.e.*, the Bankruptcy Court's granting of a partial summary judgment to the Petitioner, a reversal of that decision by the District Court and affirmation of the reversal by the Third Circuit. The Petitioner has not indicated division among the Courts of Appeals to resolve.

In short, the Petitioner's application is nothing more than an assertion that the lower court misapplied 11 U.S.C. § 506(b), which *supposed* misapplication of a properly stated rule of law, is not a basis to grant a petition for writ of certiorari. Sup. Ct. R. 10.

II. The District Court and the Third Circuit correctly held that under Section 506(b), property is property in which the debtor's estate has an interest and does not include property that the debtor's estate has no interest.

The core of the Petitioner's argument is that 11 U.S.C. § 506(b) should be read in isolation of 11 U.S.C. § 506(a), to reach the Petitioner's conclusion that *all property* which secures a loan, regardless of whether the debtor has an interest in such property, should be examined in determining whether or not interest runs post-petition.

The problem with the Petitioner's argument is that it runs afoul with the logical progression in 11 U.S.C. § 506, of first (a) and then (b), to wit; if not secured no interest, if no interest then only principal and payments must be applied thereto accordingly. Further, the Petitioner's argument fails to consider the definition of property of the estate found at 11 U.S.C. § 541(a)(1) that property of the estate is comprised of "all legal or equitable interests **of the debtor** in property as of the commencement of the case." (emphasis added).

A post-petition interest analysis begins with what is the "claim", *i.e.*, the amount the DeNofas owed the Petitioner's predecessor, Continental Illinois, "at the date of the filing of the petition." 11 U.S.C. § 502(b).

Then, the claim, if allowed, is fixed at that amount. As set forth in Continental Illinois' proof of claim, the debt as of the date of filing of the DeNofas' petition was in the amount of $866,266.88, which thus comprised its claim in the DeNofas' case. The value of Continental Illinois' interest in the estate's interest in property of the estate was the value of the mortgage it held on the DeNofas' home which the District Court found to be $275,000.00. See Appendix D, page 18a, footnote 1. Continental Illinois simply held no other security in the DeNofas' estate's interest in property other than the DeNofas' home. Thus, in this case, as of the date of the DeNofas' bankruptcy filing, Continental Illinois held a secured claim in the amount of $275,000.00 and an unsecured claim in the amount of $591,266.88, a total of $866,266.88. This breakdown is the "plain meaning" of 11 U.S.C. § 506(a), to wit:

> An **allowed claim** of a creditor secured by a lien on property **in which the estate has an interest**, . . . is a secured claim to the extent of the

> value of such creditor's interest in the **estate's interest** in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. (emphasis added).

Next, the analysis turns to 11 U.S.C. § 506(b) which states that if the "allowed secured **claim** is secured by property the value of which . . . is greater than the amount of such **claim**", the holder of the **claim**, is allowed to the extent of the oversecurity, interest, reasonable costs and charges as provided for under the agreement upon which such **claim** arose." (emphasis added).

It is clear from the entirety of the statutory language that in this case the DeNofas' home was the only property of the DeNofas' bankruptcy estate. That being so, as successor to Continental Illinois' undersecured claim, the Petitioner is entitled to no more than payment in full of its pre-petition claim. *Baybank Middlesex, supra*, at 1204.

The Petitioner contends that "Congress used the term 'property' in section 506(b) without limiting that term" and the "Third Circuit's construction of section of 506(b) imposes a limitation . . . [to] 'property in which the estate had an interest', in violation of the statute". See Petition, page 7. The Petitioner's argument rests upon cases cited for the general proposition that "statutory interpretation is that where a statute is plain and unambiguous on its face, a court must apply the statute as drafted." See Petition, page 8. Further, the Petitioner contends that the Third Circuit in considering the language of Section 506(b) "engaged in a forbidden interpretative analysis. By looking to the language of Section 506(a)", which the Petitioner contends is a "distinct" subsection and should not be

looked upon for "interpretation of Section 506(b)". See Petition, pages 9 and 10.

What the Petitioner fails to acknowledge is that the District and Third Circuit *did* apply 11 U.S.C. § 506 as drafted, not piecemeal as the Petitioner wants. Subsections 506(a) and 506(b) are part of the same statute – they are not and should not be read in isolation. Subsection (a) logically comes before subsection (b). Subsection (b) cannot be read without first reading subsection (a) to understand what is being stated in order to know whether to apply subsection (b). In this case, subsection (a) defines property as that which **"the estate has an interest"**, which definition is logically carried into subsection (b). (emphasis added).

Recently, this Court in *Rousey v. Jacoway*, 125 S.Ct. 1561, 161 L.Ed.2d 563, 73 USLW 4277 (2005), in coming to the meaning of a phrase in one part of the Bankruptcy Code, looked to other parts of the Bankruptcy Code to come to the meaning, to wit:

> We turn first to the requirement that the payment be "on account of illness, disability, death, age, or length of service." *Ibid.* We have interpreted the phrase "on account of" elsewhere within the Bankruptcy Code to mean "because of," thereby requiring a causal connection between the term that the phrase "on account of" modifies and the factor specified in the statute at issue. In reaching that conclusion, we noted that "because of" was "certainly the usage meant for the phrase at other places in the [bankruptcy] statute," including the provision at issue here – § 522(d)(10)(E). *Ibid.* This meaning comports

> with the common understanding of "on account of." (citations omitted)

Id. at 1566.

Also interesting to note in *Rousey* and exactly on point with how the Respondents have indicated is the proper way to analyze a bankruptcy matter is how this very Court started its review of the *Rousey* bankruptcy matter. At the very beginning of its analysis of the case, this Court stated:

> As a general matter, upon the filing of a petition for bankruptcy '**all legal or equitable interest of the debtor in property**' become the property of the bankruptcy estate and will be distributed to the debtor's creditors. [11 U.S.C.] § 541 (a)(1).

(emphasis added).

This Court initially set forth what it considered part of the bankruptcy estate – property which the debtor has an interest using the definition as indicated in § 541 (a)(1).

It is not that the District Court and Third Circuit limited "property" in 11 U.S.C. § 506(b), as the Petitioner contends, rather the Petitioner seeks to expand "property" in 11 U.S.C. § 506(b) to a grossly illogical result to include other property regardless of whether the debtor has an interest in such property.

Contrary to the Petitioner's contention, there is no basis under 11 U.S.C. § 506(b) to expand the reach of the word "property" beyond the property in which the creditor and debtor's estate both have an interest.

With respect to the Petitioner's hypothetical situation, at page 15 of the Petition, of the corporate borrower and

the guarantor, the corporate debtor's petition would list the bank's claim at $1,000,000 of which $950,000 would be secured and $50,000 unsecured pursuant to § 506(a). The claim would not accrue interest pursuant to § 506(b). The guarantor debtor's petition would list a $1,000,000 bank claim and real estate of $950,000 securing the bank's claim. Likewise, this claim would not accrue interest pursuant to § 506(b).

If the two cases were substantively consolidated – which the DAK and DeNofas' cases were not – then the claim in both the corporate debtor and guarantor debtor cases would accrue interest and other charges as provided for in the contract and guarantee because there would then be one claim of $1,000,000 and property of the combined estates securing the claim of $1,900,000.

If the corporate asset was sold and $950,000 was realized, the $950,000 secured claim would be expunged and the $50,000 unsecured claim would remain in the corporate case. In the guarantor's case, the bank's secured claim would be reduced by $950,000. The remaining $50,000 would be secured by real estate of a value of $950,000 upon which the bank held a mortgage. Interest and other charges pursuant to the contract would then accrue pursuant to § 506(b) with respect to the $50,000 balance remaining unpaid.

Contrary to Petitioner's argument, there is nothing "absurd" about the above. Nor are lending problems posed by it. The Petitioner is entitled to no more than payment in full of the amount set forth in Continental Illinois' proof of claim without interest as the District Court correctly held.

III. The District Court and the Third Circuit correctly held that NLI did not have the right to apply a payment made by a co-guarantor to the interest obligation of the co-guarantor, but rather the credit must go toward the principal obligation.

The Petitioner contends that the Katz's settlement payment of $250,000.00 should be applied to the interest obligation of the Katzes rather than the principal obligation of the loan debt of the DeNofas contending that "interest did continue to accrue post-petition on DAK's obligations and on Mr. Katz's Guaranty, even if interest did not accrue on Mr. DeNofa's Guaranty obligation". See Petition pages 15, 16 and 19. Further, the Petitioner contends that on this issue the Third Circuit's decision "**ignores critical facts** and, as a result, conflicts with settled principles of law." See Petition, page 16. (emphasis added).

From the outset, this factual issue should not be a basis to grant a petition for *writ of certiorari*, as stated Sup. Ct. R. 10, to wit; "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . "

As to the Petitioner's contention, the bankruptcy court fixed the Petitioner's claim at $323,615.69, after crediting payments made during the bankruptcy case, to wit; payments upon the liquidation of DAK and adequate protection payments received from Katz and DeNofas after the DeNofas' petition date. See Appendix D, page 23a-24a.

Here, there is only one claim, which is derived from one debt. All payments must be applied to it. To do otherwise

would be absurd as it would leave the DeNofas without any credit for payment by a co-debtor.

All of the adequate protection payments made by **Katz** were applied to the principal amount of the claim in fixing it at $323,615.69. See Appendix D, page 23a. This application has not been appealed as there is no question that such application is correct, as outlined in *In re Reddington/Sunarrow Ltd. Partnership*, 119 B.R. 809 (Bankr. D.N.M. 1990);

> If payments are made to an undersecured creditor, they must be allowed to reduce the allowed secured claim of the creditor. Otherwise the payments would be treated as interest payments or use value, in direct contravention of [*United Savings Association v. Timbers of Inwood Forest Assoc.*, 108 S.Ct. 626 (1988)] and Section 506.

Id. at 813.

The Katz $250,000 payment was and should be similarly treated. Since the Petitioner's claim does not accrue interest, all payments must be applied to the principal to reduce the claim. This is the holding of *In re Indian Palms Associates, Ltd.*, 61 F.3d 197 (3d Cir. 1995). In *Indian Palms*, a bank received adequate protection payments and rents in excess of expenses. The Court held that unless interest accrues on a debt during bankruptcy, there are no "theories that would support the allocation of post-petition payments to something other than a reduction of the principal debt." *Id.* at 211. There is no basis, as a matter of law, for the Petitioner to argue that the DeNofas' adequate protection payments can be applied to something other than the principal amount of Petitioner's claim. Likewise, there is no basis for the Petitioner to

argue that the Katz's $250,000 payment should not be applied to the principal of the Petitioner's claim. There is no distinction in the *Indian Palms* case concerning the source of the payments, which would justify a different treatment for the Katz $250,000 payment than the adequate protection payments made by the Katzs and DeNofas.

It is not disputed that there is only one "liability" – the loan to DAK. Thus, all payments received on account of the debt must be applied to the debt, which is the only liability. The right of the Petitioner to collect interest is a contractual right under the Guarantee which is modified by bankruptcy law in Section 506. The obligation to credit the amount due by payments from all sources is not modified and still enforceable here.

If payments are applied to something other than the principal amount of the claim, the Petitioner as a creditor would receive more on its claim than the value of its collateral, which is prohibited and not good policy. As there are other unsecured creditors of the DeNofas, the Petitioner would receive a higher percentage of its deficiency claim that is unsecured than other similarly situated unsecured creditors by not having to count the Katz payment, and still collecting the full value of their claim from the DeNofas.

This is what *Timbers* prevents in only awarding interest when the value of the collateral is more than the claim. Creditors like the Petitioner are protected from loss because as to Katz any recovery in the bankruptcy merely reduces his liability by an equal amount, and the Petitioner could always, in theory, recover its balance from Katz or anyone else jointly obligated not in bankruptcy.

That in this case the Petitioner jumped the gun and settled too quickly with Katz is its problem, and a matter between Katz and the Petitioner.

There is simply no authority for the Petitioner's position that it can ignore the Katz payment in computing its claim in this case. If the Petitioner were right, the DeNofas would have no benefit from Section 506 of the Bankruptcy Code. Most importantly, from a policy point of view, other creditors, who benefit from the § 506 bifurcation of claims because it preserves their pro rata distribution, would be prejudiced if a creditor could collect from co-obligors outside of bankruptcy, but not have to apply such payment against the co-obligor in bankruptcy.

CONCLUSION

For all the foregoing reasons, the Respondents, respectfully urge this Court to deny the Petitioner's request for an issuance of a writ of certiorari to review a decision and order of the United States Court of Appeals for the Third Circuit entered February 17, 2005.

Respectfully submitted,

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